SUPREME COURT, U. S.

No. 407

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In the
Supreme Court of the United States
OCTOBER TERM, 1968

STATE OF LOUISIANA,
THROUGH C. MURRAY HENDERSON, WARDEN,
Petitioner,

v.

ALBERT GEORGE PROGUE, JOHNNY
JAMES WILLIAMS, AND ROOSEVELT WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ALBERT GEORGE PROGUE, JOHNNY JAMES WILLIAMS, AND ROOSEVELT WASHINGTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Louisiana, through C. Murray Henderson, Warden of the Penitentiary, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 16, 1968.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 393 F. 2d 938, sub. nom. Wingate White, etc. v. Progue, et al., and printed infra, Appendix A, page 59. The opinion of the United States Court for the Western District of Lou-

isiana is reported at 271 F.Supp. 271, sub.nom. Progue, et al v. Middlebrooks, etc. and printed infra, Appendix A, page 61. The Decree of the United States Court for the Western District of Louisiana is printed infra, Appendix A, page 103. The opinion of the Louisiana State Supreme Court on the same issues and using the same transcript as herein, is reported at 243 La. 337, 144 So. 2d 352, nom. State v. Progue, et al, and printed infra, Appendix A, page 76.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 16, 1968, (infra, Appendix A, page 59). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

FIRST: Whether or not, in this pre-Miranda case, a Federal District Court, in considering the state court transcript in a non-evidentiary hearing upon an application for a writ of habeas corpus may ignore unrefuted facts indicating voluntariness of confessions, and seize upon disputed facts thoroughly rebutted indicating non-voluntariness of confessions in the same transcript, especially in light of 28 USC 2254(d), in order to reach its decision granting the writ.

SECOND: Whether or not as a matter of law the Federal District Court strayed from the legal tests laid down by the United States Supreme Court under pre-Miranda jurisprudence governing voluntariness of confessions.

THIRD: Whether or not as a matter of law, the Federal District Court strayed from the legal tests laid down by the United States Supreme Court in its previous jurisprudence governing illegal search and seizures.

STATUTES INVOLVED

UNITED STATES CONSTITUTION AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC SECTION 2254(d)—STATE CUSTODY IN FEDERAL COURTS; REMEDIES

* * * *

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a

whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondents, Albert George Progue, Johnny James Williams and Roosevelt Washington, were tried and convicted by the State District Court for the Parish of Caddo, State of Louisiana, on the charge of murder on June 17, 1961. On November 22, 1961, the Honorable Judge John A. Dickson, Jr., rendered a judgment against all three, sentencing them to death by electrocution as provided by the laws of the State of Louisiana, on a date and at a time to be fixed by the Governor of Louisiana. An appeal of this case was filed in the Louisiana State Supreme Court and that Court affirmed the conviction and sentence and a rehearing was refused by said Court on October 3, 1962. An application for writs to the United States Supreme Court was applied for on behalf of all three but apparently abandoned.

The respondents were then confined at the Louisiana State Penitentiary awaiting further action on the judgment. While so incarcerated, respondents filed an application for Writ of Habeas Corpus in the Baton Rouge Division of the Federal District Court. That court transferred the matter to the Western Louisiana Division of the Federal District Court under 28 U.S.C. 2241(d). The Honorable Ben C. Dawkins, Jr. rendered judgment, without an evidentiary hearing relying

exclusively upon a review of the State trial transcript and memorandum filed on behalf of both parties in favor of the three respondents herein, granting their application for a Writ of Habeas Corpus. The State of Louisiana, through the warden, timely appealed to the United States Court of Appeal for the Fifth Circuit which Circuit affirmed the District Court by opinion dated May 16, 1968. From this judgment the State of Louisiana now makes its application, as relator, in this Court for a Writ of Certiorari to the United States Court of Appeal.

REASONS FOR GRANTING THE WRIT

I.

The matter presents a serious question as to whether or not a Federal District Court can ignore the requirements of the statute governing writs of habeas corpus and thereby causing a writ to issue improvidently. The statute, 28 U.S. 2254(d) provides, in part,

"Section 2254. State custody in Federal Courts; remedies . . .

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written in-

dicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not recieve a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as

a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

This contention is based on certain facts which developed during the course of these proceedings in the Federal District Court below. Particularizing, when the State of Louisiana, acting through the warden, filed its response in the Federal District Court below, among its allegations, the following were included:[1]

13.

"Respondent further shows that all issues which are set forth in the application for a Writ of Habeas Corpus have been raised in the state trial court and that a transcript of the trial was prepared and submitted to the Louisiana State

[1]The full response by the State is printed infra, Appendix B, beginning at page 104.

Supreme Court, a copy of which is attached and made a part hereof.

14.

"Respondent further shows that a factual determination of all the issues in the present application for a Writ of Habeas Corpus (and other issues) was made after a hearing on the merits thereof by a State court of competent jurisdiction (the First Judicial District Court in and for Caddo Parish, Louisiana) in a proceeding to which the applicants and the State of Louisiana (through the District Attorney) were parties, as shown by transcript thereof which is attached hereto and made a part hereof and incorporated herein, particularly

(a) the oral opinion[2] of the trial judge (State Tr. 674-77) which ruled that the confessions were made freely and voluntarily, based on the "totality" of the facts;

(b) The trial judge's Per Curiam[3] to Bill of Exception No. 13 which is a written opinion to the same effect (State Tr. 249-261);

(c) Minutes of Court showing overruling of Motions for Severance (State Tr. 8-9);

(d) the trial judge's Per Curiam to Bill of Exception No. 2 which is a written opinion relative to Severance (State Tr. 144-46); and

(e) the opinion of the Louisiana Supreme

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[2]See excerpt from State Transcript, printed infra as Appendix C, page 118.

[3]See State Trial Court Per Curiam, printed infra as Appendix C, page 118.

Court on appeal of the whole case, reported in 243 La. 337, 144 So. 2nd. 352.

15.

"Respondent further shows:

(a) the merits of all factual disputes were resolved in State Court hearing, by the trial judge, the jury and the State Supreme Court;

(b) the fact finding procedure employed by the State Court was fully adequate to afford, a full and fair hearing, particularly on the free and voluntary nature of the confessions and the "totality" of the facts because

(1) The state, under Louisiana law, was compelled to first prove all facts surrounding the giving of the confessions before the trial judge alone, out of the presence of the jury, during which hearing the defendants were allowed to take the witness stand for the limited purpose of traversing the State's foundation; the defendants did each do so and likewise produced additional witnesses of their own; and then the trial judge ruled that the State had proved that the confessions were admissible evidence;

(2) The State was then compelled to again prove, before the jury, all facts surrounding the giving of the confessions so as to show the "totality" of the facts and to convince the jury beyond a reasonable doubt that the confessions were in fact given freely and voluntarily;

(3) the defendants, in their case in chief before the jury, again testified in their behalf to traverse the State's foundation and again pro-

duced the same and other additional witnesses; all as shown by State Tr. 270-1245. (These last four volumes of the transcript contain all of the testimony and evidence relating to the facts surrounding the giving of confessions, including testimony adduced out of the presence of the jury and testimony before the jury.)

(c) All of the material facts were more than adequately developed at the State court hearing, some of them several times;

(d) the State court did have jurisdiction both of the subject matter (state crime of murder) and over the persons of the applicants herein, in the State court proceeding;

(e) Although there was no proof of indigency by the applicants, the State court appointed separate counsel for each applicant, which counsel were competent and had at least five years' practice in Louisiana (one had practiced for more than 24 years with active criminal experience for many years), and said counsel were appointed on May 17, 1961, the very next day after the indictment was returned on May 16, 1961 (and long before formal arraignment);

(f) each of the applicants received a full, fair and adequate hearing in the State court proceeding, which consisted of (among other things) full arguments on all pre-trial motions, a complete 12-man jury trial which required a unanimous verdict under State law, many months to perfect all desired Bills of Exception, full arguments on the Bills of Exception and post-conviction Motions (Motion for New Trial and in Arrest of Judg-

ment) and unlimited time for briefing and argument in the Louisiana Supreme Court on appeal;

(g) under the present jurisprudence of the United States Supreme Court as of the date of the filing of this Response, your Respondent shows that no one of the applicants was in any wise denied due process of law in the State court proceedings; and

(h) *an examination of the transcript attached hereto and of the opinion of the Louisiana Supreme Court, will show that the "record in the State court proceeding, considered as a whole" leads to the inevitable conclusion by this Honorable Court that the factual determination is more than "fairly supported (indeed, overwhelmingly supported) by the record."* (Italics Supplied)

The response, quoted above in part, shows conclusively that this case falls squarely within 28 U.S.C. Section 2254(d). The Federal District Court ordered no evidentiary hearing because the parties stipulated *"that the State Court record contained all of the relevant facts and they chose to rely solely upon that evidence . . ."* (Italics supplied) [4] Considering this stipulation the Federal District Court was at that moment presented with a case squarely within 28 U.S.C. Section 2254(d). No question exists as to whether or not the State Court is a court of competent jurisdiction. Therefore, if the State Court record contained a determination after a hearing on the merits of the same issues as here, the determination, evi-

[4] See Opinion of Federal District Court, printed infra, Appendix A, page 63.

denced by a written finding, opinion or other reliable written indicia, shall be presumed correct.

An examination of the State Court Record shows that the same includes a thorough determination of the issues in this case, as evidenced by its Per Curiam to Bill of Exception Number 13, printed infra, Appendix D, page 118. This alone was enough to create the presumption. Furthermore, the State Court in its Per Curiam was enlarging on rulings already rendered earlier in the trial when ruling on the admissibility of the confessions and the arrests. This portion of the State Court transcript is printed infra, Appendix C, page 113.

These two items in the State Court record point up how clearly the issues in this case fall inescapably within the purview of 28 U.S.C. 2254(d).

The next question is whether or not the presumption created by 28 U.S.C. 2254(d) was or can be overcome by the occurrence of any of the eight (8) circumstances outlined in the statute as sufficient to overcome it. As to the first exception, it is indisputable that the merits of the factual dispute were resolved in the State Court hearing. As to the second, a reading of the State Court judge's Per Curiam conclusively shows the fact finding procedure was more than adequate in affording these three people on trial a full and fair hearing. Furthermore, the material facts were more than adequately developed as to statements, confessions and illegal seizures both within and without the hearing of the jury. No possibl[illegible]stion

exists about the State Court's jurisdiction or about appointment of counsel. The State Court Transcript from beginning to end indicates these three defendants were blessed with the most competent sort of defending counsel. The sixth exception could not and did not occur because the State Court Transcript indicates the State Court trial was as full, fair and adequate insofar as constitutional points are concerned as any pre-Miranda case could be. Furthermore, no allegation appears in the application for writs setting up any other grounds denying due process than those issues ruled on by the State Court trial judge, therefore no substance exists as to the seventh exception.

As to the eighth exception of 28 U.S.C. 2254(d), a close reading of the Federal District Court's opinion indicates no where a conclusion that the State Court's factual determination is not fairly supported by the State Court record. The conclusion is inescapable that the Federal District Court, without a single reference or thought of comity, simply ignored the State Court's determination.

The State of Louisiana respectfully suggests the provision of law, 28 U.S.C. 2254(d), was put into the Federal statute not merely because of comity, but mainly to prevent the very error complained of herein, namely, a Federal District Court completely ignoring a State Court determination so as to create a "second-guess" situation against which society has no way to defend itself. It is respectfully submitted such is the case here because in this case the Federal District Court completely ignored the undisputed facts in the

record which tended to show voluntariness of the three confessions involved and embraced exclusively the hotly disputed and thoroughly refuted facts tending to show involuntariness, directly in the teeth of the State Court's determination, and in thorough violation of 28 U.S.C. 2254(d). The statute, after all, cannot be and is not meaningless. It is on the books because Congress felt Federal Courts should not "second guess" equally competent State Courts, and because this law prevents defendants from laying the groundwork in a State Court trial that can always be used in a Federal Court later since the State Court's determinations won't mean anything anyway.

Unless the Supreme Court of the United States enforces 28 U.S.C. 2254(d) State Court determinations will be reduced to mere administrative pronouncement on matters that will inevitably be tried *de novo* in subsequent Federal Court habeas corpus proceedings. This Court should order certiorari to review this phase of the case, if nothing else, because of the immense impact the evolving constitutional jurisprudence is having within our judicial system.

II. & III.

This matter presents two serious questions alternatively. Should the foregoing questions be decided against the State of Louisiana, then we submit the Federal District Court, and the United States Court of Appeals for the Fifth Circuit in affirming the Federal District, committed reversible error by improperly applying the rules of this Court in disposing of

the factual issues in this pre-Miranda case as to confessions and disposing of factual issues as to searches and seizures. These points are considered together in the course of argument following.

The Federal District Court in its opinion below[5] first states the rule, but then fails to follow it in reaching its conclusion on the facts. For example, the Court stated in its opinion that "The question of our determination is whether, considering the totality of circumstances, petitioners' statements were involuntary and should have been excluded." The State of Louisiana has no quarrel with this test but it does quarrel with the Court's subsequent failure to consider "the totality of the circumstances" just mentioned as a part of the test to be applied. Specifically, the error was in choosing to employ only the hotly disputed and thoroughly refuted facts in the State Court record championed by the three applicants, and ignoring the undisputed facts in the State Court record championed by the State of Louisiana.

A complete review of the factual situation[6] is necessary to bring out the justification of the State's quarrel.

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[5]Infra, Appendix A, page 61.

[6]In doing so, all reference to transcript are to the State Court Transcript made during the State Court trial. These references coincide with those used in the Federal District Court's opinion, and the said State Court Transcript forms a part of the original record from the United States Court of Appeals for the Fifth Circuit, already forwarded to this Court. The State Court Transcript is not printed infra, except in part wherever otherwise noted in this application.

Jang Gow was an elderly Chinese widower who had operated the New York Cafe at 1038 Texas Avenue, Shreveport, Louisiana, with his son, Nuey Gow, since 1950. He lived in living quarters in a room at the rear of his cafe.

During the early morning hours of December 14, 1958, and in the course of the commission of an aggravated burglary and a robbery by the appellees, Mr. Jang Gow was beaten about the face and head in his bedroom, in the hallway immediately outside the bedroom, and also at the place where the cash register was located. The weapon used in the beating of Mr. Gow during the robbery and burglary was a pistol owned by A. G. Progue, one of the appellees.

In March, 1961, Detective Sgt. Roberson, a city officer, was in possession of certain leads that gave him probable cause to arrest the relators. He discussed the matter with his superior and subsequently arrested each of the respondents on a Friday evening in the latter part of March, 1961.

Respondent Roosevelt Washington was allowed to return to his home for the night, after his arrest, upon his promise to return the next day about 10:00 A.M. which he did so. He gave a statement within two hours upon his return which tended to implicate the other two respondents. He later that same day made a second statement to the same effect as the first one. Neither of these statements were offered into evidence.

It was a few days after these statements were made that Officer Roberson was without a partner in

as much as his regular partner, Major Borland, was retired. It was not until a Lt. Pynes was assigned to work with Officer Roberson on the 30th day of March that Roosevelt Washington's statements were recorded and which was later typewritten as his police statement. Shortly thereafter Washington voluntarily went with the aforementioned Roberson and Pynes to his home where he produced for them a jacket which he said was the one that he wore when the crime was committed by the respondents herein. As Roberson and Pynes were on the night shift, it was after the return from Washington's home that he made a second recorded statement at the Sheriff's Office. Washington then agreed to go to the scene and point out the part that he and the others played in the commission of the crime.

The re-enactment at the scene was made by Washington the next day, on March 31st, in the presence of Pynes, Roberson, the Chief of Police, the Police Commissioner, the District Attorney, the son and grandson of the deceased, and photographers and representatives of the press, radio and television facilities.

Subsequently, Washington examined and identified a pistol, which the officers later recovered as being the pistol which Progue used in beating Mr. Gow. Then, on Sunday, April 2nd, Washington signed the Police Statement.

During the day on April 4th Washington was transferred from the City Jail to the Parish Jail by Police Officers who had no other connection with the

case. Later on during that day, the Coroner's office requested the Sheriff's Department to bring each of the men down for the purpose of seeing if they wished to make a statement to the Coroner. A Deputy Sheriff Pittman was assigned for that purpose and he had no other connection with the case before or after that time.

At the Coroner's office there were no police officers present, but merely the Deputy Coroner, (Dr. DeLee, now Coroner) the District Attorney, and Deputy Pittman. At that time and place, Roosevelt Washington gave an oral statement to the Coroner, which was taken down on the recording machine operated by Dr. DeLee.

Three days later, on April 7th, the Coroner's office again requested that the men be brought down separately to hear their statements read after they had been transcribed. A Deputy Ira Tilley was assigned for that purpose, and he had no other connection with the case before or since that time.

There, in the Coroner's office in the presence of Deputy Tilley and Mrs. Frey, the Coroner's typist, the statement was read to Washington, he said it was correct, and he then signed the original and several copies, along with the other two persons who signed as witnesses.

While the jury was out, the State produced all of the officers who had had any contact with Roosevelt Washington from the time of his arrest until he signed the Coroner's Statement. These persons includ-

ed City Police Officers Sgt. Roberson, Major Borland, Lt. Pynes, Chief of Police Teasley, Police Commissioner Downs, Dr. DeLee, Mrs. Frey, Deputy Pittman and Deputy Ira Tilley. (It was also stipulated that the testimony of the District Attorney would be the same as that of Chief Teasley at the time of the reenactments, and the same as Dr. DeLee at the time of the giving of the Coroner's Statements—see Tr. page 996) (The State also produced Captain Bryant, Deputy Sheriff, who was present at one interview of Progue by Borland and Roberson.)

The first thing that the Coroner did at the time of the giving of the oral statements (after each accused said he wished to make a statement) was that the Coroner read to each respondent his signed Police Statement and asked him if it was TRUE. Washington so answered affirmatively without any corrections.

While the jury was out, Washington took the stand and, although he answered various leading questions, Washington never testified that he was struck, beat or hit.

Moreover (as shown on page 579, lines 20-23 and several times on page 580 of the Transcript), Washington testified on direct examination at least FOUR TIMES to the effect that his statement to the doctor (Coroner's Statement) "was made of my own free will."

Since the Coroner's Statement included the Police Statement verbatim (and also other information in addition to the facts detailed in the Police Statement),

and since Washington made absolutely NO CLAIM as to any beating, the District Attorney did not cross-examine Washington at all.

Washington then, by his own testimony on direct examination (without any cross-examination) before the Judge, out of the presence of the jury, acknowledged that his statement was made freely and voluntarily, as the Court so held (Tr. 257, 259, 676).

Turning next to Johnny James Williams, the record shows that Williams was arrested by Sgt. Roberson on his job in the presence of his employer during the late afternoon on the same Friday that the other two respondents were arrested. He was questioned briefly the next day (Saturday).

Subsequently (after Roosevelt Washington made his recorded statement at 9:20 P.M., on March 30th, and also after Washington had obtained his jacket shortly after midnight) Williams went with Pynes and Roberson to his brother's house and there recovered a checkered car coat which he identified as being his and which he had given to his brother. Williams was not questioned any more that night (the night of March 30-31) although Washington had implicated him.

Then, about 9:00 A.M. that morning, March 31st, Williams sent word to Chief Teasley that he wished to make a full statement. Teasley explained to him that the regular procedure would be for him to make a statement to Pynes and Roberson, Williams agreed to this, so those two officers, who were at home asleep,

returned back to the Police Station about 10:00 A.M. on March 31st.

Williams then made to them an oral statement which was substantially the same as his final Police Statement which he signed. Williams also agreed to make a recorded statement, and he did so at the Sheriff's Office that same day in the presence of Pynes and Roberson.

Williams also agreed to make a re-enactment of the crime at the scene, which he did do in the late afternoon of March 31st, right after Roosevelt Washington and in the presence of the same persons who had been present at the time of Washington's re-enactment.

Just as in the case of Washington, Williams likewise subsequently identified the pistol which the officers later recovered, he also signed his Police Statement on Sunday, April 2nd, he was transferred to the Parish Jail by other police officers on April 4th, and later that day he made his oral statement to the Coroner, which was taken down by the Coroner on a recording machine in the presence of the same persons as was done with reference to Roosevelt Washington.

Subsequently, on April 7th, Williams was brought back to the Coroner's office and there, in the presence of Deputy Tilley and Mrs. Frey, his transcribed statement was read to him, he said it was correct, and he then signed the original and several copies, along with the other two persons who signed as witnesses.

While the jury was out, Williams took the stand

for the limited purpose of traversing the State's foundation showing that his statements were freely and voluntarily made.

At that time, on cross-examination, Williams acknowledged that:

on March 31, at 9:00 A.M., when he spoke to Chief Teasley and Commissioner Downs, he made NO COMPLAINT to them about anyone mistreating him in any way (Tr. 535, lines 26-30; page 536, lines 1-5);

on March 31, he made NO COMPLAINT to Captain Bryant when he made a recording in the Sheriff's Office about any alleged mistreatment (Tr. 536, lines 6-17);

when Lt. Pynes was first assigned to the case, he made NO COMPLAINT to him about any mistreatment of him by either Major Borland or Sgt. Roberson (Tr. 536, lines 18-22, page 537, lines 17-19, 29-30, and page 538 lines 1-11);

he made NO COMPLAINT to the District Attorney as to any mistreatment by any persons when he met the District Attorney and discussed this case with him at the re-enactment of the crime (page 539, lines 23-30 and page 540, lines 1-9); and

he made NO COMPLAINT to the Coroner on April 4th (Tr. 545, lines 19-20) nor to Deputy Sheriff Tilley on April 7th (Tr. 546, lines 1-8), even though there were no City Police officers present on April 4th and April 7th.

Also, on cross-examination, Williams acknowl-

edged and repeated many of the things which he had said and pointed out at the re-enactment (see Tr. page 541, lines 2-30; all of page 542; all of page 543, and page 544, lines 1-25). Williams further testified to matters showing that the giving and the signing of his Coroner's Statement were done freely and voluntarily (see Tr. page 544, lines 28-30; all of page 545, and page 546, lines 1-19).

A typical example of the testimony of Williams on cross-examination about the re-enactment is as follows:

"Q But, you do remember all these other things that you and I have just discussed?

A Yes, sir.

Q Now, did you not at that time and place at the re-enactment of the crime, did you not tell me all those things freely and voluntarily on your part?

A Yes, sir.

Q And did you not answer questions that I asked you?

A Yes, sir.

Q And if I asked you a question or something that you didn't know about, didn't you tell me that you didn't know about that?

A Yes, sir.

Q But, you have told us tonight what you told me that day at the re-enactment of the crime. Is that correct?

A Yes, sir.

Q And at that time and place when I was questioning you, I made no threats to you. Isn't that correct?

A That is right.

Q And I didn't promise you anything. Isn't that correct?

A That is right.

Q And I was asking you for information. Wasn't that correct?

A Yes, sir.

Q And you were answering my questions?

A That is right".
(Tr. page 543, lines 26-30; page 544, lines 1-8, and 13-25.)

A typical example of the testimony of Williams relative to the giving and signing of the Coroner's Statement is shown as follows:

"Q And Dr. DeLee did read you the Police Statement which you had previously signed and asked you if you had signed it, and asked you if it was correct?

A Yes, sir, he asked me was that the statement that I had signed at the police station.

Q And didn't he also ask you was that statement correct?

A Yes, sir.

Q And your answer was yes, was it not?

A Yes, sir".
(Tr. page 545, lines 9-17.)

"Q Then, three days later on April 7th, when you were brought back by still a different deputy sheriff, the last one that testified, the red-headed gentleman named Tilley, did you make any complaint to him, either, on your way to the coroner's office where you signed that coroner's statement, or on the way back to jail?

A No, sir, I didn't make any complaint to him.

Q Now, had you ever seen that officer before?

A No, sir.

Q And had you ever seen before the officer who brought you down for the original recording of the coroner's statement?

A No, sir.

Q They didn't do anything to mistreat you, did they?

A No, sir.

Q They didn't tell you what to say, did they?

A No, sir, they did not.

Q They didn't promise you anything, did they?

A No, sir".
(Tr. page 546, lines 2-20.)

Although Williams claimed that he was under pressure and although he made vague hints about alleged mistreatment, the only definite complaints were approximately three in number. One was that Sgt. Roberson "hit me or something like that," (which was

positively denied by Roberson); that he was cursed by Pynes and Roberson, and by no one else (which was also positively refuted by Pynes and Roberson), and, finally, that Pynes and Roberson indicated to him that they would get the District Attorney to sentence him to two or three years (which was also emphatically denied by Pynes and Roberson), although Williams testified on cross-examination that he knew that sentences were passed only by judges and never by any District Attorney (Tr. page 564, lines 6-8).

Not only was this last claim fantastic (as the Court so held), but Williams also falsified his testimony when he stated positively that Mrs. Frey did not read to him his transcribed Coroner's Statement on April 7th.

In light of the testimony of Williams (out of the presence of the jury) in which he acknowledged many facts showing that his statements were freely and voluntarily made, that the re-enactment by him was likewise voluntarily made and, further, in light of the fact that the State produced all the witnesses who ever had any contact with Williams, (all of whom stated positively under oath that Roberson never hit or struck Williams, that the officers did not curse him, and they made no such fantastic promise of guaranteeing a light sentence by the District Attorney), the Trial Court held the statements to be freely and voluntarily made by Williams.

On this point, the Trial Judge said in making his ruling:

"Williams' statement and Washington's statements are, by their own testimony, admissible, free and voluntary, and obtained without duress and without intimidation, and without promise of reward."

See, also Tr. 258, (Per Curiam of the Trial Judge), wherein the judge discusses the acknowledgments by Williams that he never made any complaint of any alleged mistreatment (although he had ample opportunity to do so) to various separate law enforcement officers at times when Roberson and Pynes were not present; and wherein the judge also mentioned the fact that Williams confirmed what he had said and had pointed out at the re-enactment.

Turning to the factual matters concerning the respondent Progue, the record shows first that he was arrested by Roberson at his home on a Friday evening. The next evening he was questioned at the Caddo Parish Jail by Major Borland and Sgt. Roberson in the presence of a Captain Bryant, a Deputy Sheriff. This was on Saturday and he was likewise questioned briefly the next day by Major Borland and Sgt. Roberson in the presence of Chief of Police Teasley.

Progue also indicated that he was questioned again on Monday, which is doubtful, but, at any rate, Major Borland was present at those preliminary interviews and Progue always insisted that he was treated all right whenever Major Borland was present. In fact, his counsel was most insistent upon entering a stipulation to that effect (see Tr. page 996, page 613, lines 10-18).

Therefore, the gist of Progue's testimony is that during those sessions when Major Borland was present he was never beaten or struck and that nothing took place which caused him to make a statement. This is further borne out by the fact that he did not make any statement during the preliminary conferences while Major Borland was on the case.

On March 31st, after Washington had made his first recorded statement the previous evening at 9:20 P.M. (and after Washington and Williams had recovered the jacket and car coat belonging to them) and, further, after Washington and Williams made a recorded statement at the Sheriff's office during the day of March 31st, Pynes and Roberson informed Progue that Washington and Williams had made their recorded statements.

Likewise, on March 31st, after Washington and Williams made their re-enactments, Pynes and Roberson informed Progue of that fact. Then, the next day, on April 1st, Progue voluntarily told Pynes and Roberson about having let one James Henderson have a pistol which belonged to him. Pynes and Roberson went out and interviewed Henderson and as a result thereof learned that that was a different pistol from the one which had been used in the beating of Mr. Gow.

They returned to the jail and Progue voluntarily told them that he had had another pistol which he had let Herbert Young have and which he understood that Young turned over to Melvin Dixon. The two detec-

tives went out, interviewed Young and Dixon, and recovered that second pistol from a Captain Dooley of the Bossier Sheriff's Department at his home in Benton, Louisiana.

They returned to the jail on April 1st and showed Progue that pistol. Progue did not positively identify it but stated it "resembled" the one he had let Herbert Young have. Meanwhile, Washington and Williams identified the pistol as being the one Progue had used in beating Mr. Gow.

On April 2nd, the officers reduced to writing statements from Herbert Young, Melvin Dixon, James Henderson, Roosevelt Washington, and Johnny James Williams, all of whom signed their respective statements on that day. Shortly thereafter, the two detectives informed Progue that those persons had signed those statements.

On Monday, April 3rd, the officers recovered from one Pearlie B. Small, (the woman with whom Progue was living) at the home to which she had moved, a jacket which she identified as belonging to Progue. She also signed a statement relative to the two pistols and particularly about the pistol which had been recovered from Captain Dooley.

During the late afternoon of April 3rd, Progue was informed of the statement of Pearlie B. Small and, although he did not positively identify his jacket, he said it "resembled" one owned by him. At that point, Progue offered to make a statement telling of his part in the commission of the crime, which was

taken down and typed by Detective Pynes at Progue's dictation and signed by him at that same time.

Also, at that time, Progue offered to re-enact the crime at the scene. It being then about 8:50 P.M., the re-enactment was postponed until the next day.

On that next day, April 4th, during the middle of the morning, Progue accompanied Pynes and Roberson and made a re-enactment of the crime at the scene, pointing out his part and also what the other two men did. No other law enforcement officers were present but the son and other members of the family of the deceased were present at the Cafe.

When the two detectives returned with Progue from the scene they noticed that Washington and Williams were being transferred to the Parish Jail by other officers who had no connection with the case, so Pynes and Roberson then turned Progue over to the transferring officers at that time.

The factual matters relative to the giving of the Coroner's Statement by Progue during the afternoon of April 4th, and his signing the transcribed Coroner's Statement on April 7th, are the same as the other two respondents with two minor exceptions.

One of these exceptions was that after the Coroner read to Progue his Police Statement, Progue made two insignificant corrections therein, which the Coroner noted. The other variation is that, at Progue's specific request, the recording machine was cut off twice, during which intervals Dr. DeLee explained to Progue that if he wished to make a statement, it was

necessary that Dr. DeLee administer to him the oath to tell the truth.

The gist of Progue's testimony out of the presence of the jury as to why he felt that he was under coercion or duress and why he signed his statements, including the Coroner's Statement, was because he did not want his wife to be put in jail as a Material Witness and that he did not "want to get a beating" (Tr. page 632, lines 14 thu 17).

Yet, as the Trial Court pointed out in its Per Curiam (Tr. page 259),

> ". . . the State produced his common-law wife as a State witness and she was not examined by any defense counsel about any such matters as that."

See also Trial Court's ruling on this matter (Tr. 677, lines 2-16) to the same effect.

With reference to any alleged beating or threat of a beating, the State produced every single witness that ever had any contact with Progue at any time and all of them positively and categorically stated that no one ever struck, beat, or threatened Progue in any way and, therefore, on this point the issue is one of veracity and credibility. Each officer as to whom Progue made even the slightest hint of having mistreated him in any way specifically denied each hint or implication made by Progue.

On the matter of veracity and credibility, the Trial Court, in making its ruling, specifically said:

"It resolves to a question of credibility, and if

anything Progue proved on his testimony in this Court, it was that Progue cannot be believed . . ." (Emphasis ours.) Tr. 677, lines 26-30; 678, lines 1-4).

As shown by the Per Curiam of the Trial Court in the first two paragraphs on page 260 of the Transcript, Progue falsified his testimony when he said there were five persons present (including himself) at the time he gave his sworn Coroner's Statement, when there were actually only four persons present (including Progue), and the testimony of the other three persons was directly contrary to Progue's claim about an unknown, mysterious man. Also, in testifying under oath before the Trial Judge, Progue said that in his statement under oath made by him before the Coroner he swore to something that was not true.

Concerning the implications and inferences about the alleged beating, the following is an exact quotation of Progue's testimony on cross-examination out of the presence of the jury:

"Q When Commissioner Downs spoke to you at your cell on the one occasion when he spoke to you, you told him nobody had struck you. Is that correct?

A I told him nobody had struck me.

Q That is true?

A That was true.

Q It is still true?

A It is still true. Nobody struck me".
(Tr. page 633, lines 14-21).

Once more, on the matter of any alleged beating or other intimidation, the Trial Court in its ruling said:

> "Progue himself has testified to nothing that transpired intimidating him, nothing that happened to him, nothing that he said happened to him frightened him into making a statement; . . ." (Tr. 677, lines 17-19)

All of the references herein made to testimony taken outside of the presence of the jury shows that there was no real showing by any of the respondents as to anything which happened to them or was done to them to compel or induce them to make any of their statements.

Therefore, at the time the judge made his ruling, there was no definite or concrete evidence of any physical mistreatment of any of these respondents by any one. Then, after the jury returned and after the State laid its foundation in the presence of the jury by producing all of the officers who had had any contact with any of the respondents, there was still no evidence of any mistreatment, coercion, or inducement that could conceivably cause any one of the respondents to make any of the statements.

Therefore, when the Court actually admitted the statements into evidence in the presence of the jury, all the evidence before the Court and before the jury showed that the statements were freely and voluntarily made.

The above is set forth merely to show that any

subsequent testimony by any of the defendants, of a positive or definitive nature, asserting any alleged physical mistreatment or other alleged coercion, was definitely false and came as an afterthought by each defendant himself when he testified in his defense in the presence of the jury.

For example, Washington had already acknowledged out of the presence of the jury that his Coroner's Statement was free and voluntary and therefore the District Attorney did not even cross-examine him. Nevertheless, when he testified before the jury he greatly magnified and embellished his alleged claims of mistreatment. He did this by mentioning in the presence of the jury at least five or six items of asserted mistreatment which he freely acknowledged as being related by him for the very first time at that very moment (Tr. page 1100, 1101, 1104 and 1105).

In fact, he further admitted before the jury that some of these wild claims were on matters that he had never told to any one, not even to his attorney. He also acknowledged that one or two of these items occurred to him after he had heard Progue and Williams testify. In the last analysis, insofar as Washington is concerned, he restricted all of his alleged claims of mistreatment to the action of Lt. Pynes and Sgt. Roberson (mostly Roberson) (see Tr. page 1103, lines 28-30). Needless to state, on rebuttal before the jury, the State produced Pynes and Roberson again and they each specifically denied each and every allegation by Washington.

Therefore, this was a disputed matter of fact which was decided adversely to Washington by the jury in its verdict and by the Trial Court in overruling the Motion for New Trial. Moreover, Washington had the benefit of relating those asserted claims, which the State insists are false, to the jury itself.

With reference to Williams, the situation is almost the same (in his testimony in the presence of the jury) as in the case of Washington, except that Williams did not embellish his claims quite as much and did not "borrow" alleged items of mistreatment from the other two defendants.

The testimony of Williams before the jury on alleged mistreatment was shown by the State to be false in several particulars. One of these was the claim by Williams that Mrs. Frey, the Coroner's secretary, did not read back to him the Coroner's Statement at the time he signed it. Another false statement was his claim that he was questioned by Sgt. Roberson alone on a particular date in which the evidence was overwhelming to the effect that neither he, nor either of the other respondents, were questioned by any officer on that date.

Once again Williams confined his complaints as to mistreatment, as vague as they were, to Lt. Pynes and Sgt. Roberson. Both of these officers took the stand in rebuttal before the jury and denied categorically each of the few vague complaints made against them by Williams. Williams did testify on direct ex-

amination before the jury that he himself sent for Chief Teasley to tell the Chief that he wanted to make a statement (Tr. page 1010). This was at a time when he was not being questioned by any one.

With reference to the relator Progue, he added many items of alleged mistreatments to his testimony before the jury (as to which he had not testified out of the presence of the jury).

Progue acknowledged that nothing was ever done during the time that Major Borland was connected with the case that would cause him to make any statement. He repeatedly stated that no alleged promises and no alleged profanity caused him to make any statement. In fact, he confined his claim of coercion almost completely to alleged physical mistreatment to the actions of Lt. Pynes and Sgt. Roberson. On cross-examination in the presence of the jury, he admitted that in at least ten separate instances that the alleged claims of mistreatment by them were being told by him for the first time and that he had not mentioned those items at all previously in the trial when the jury was out. (See Tr. pages 1196, 1197, 1198, 1199, 1200, and 1201.)

Similarly, he insisted on making a demonstration to the jury about places he was allegedly struck but said that he did not make such a demonstration to the judge earlier in the trial because there was no jury present to look. In many instances on his direct examination before the jury, instead of answering the question from his own counsel, he would recite alleged

items of mistreatment that were not even responsive to the question. In fact, on occasions, his own counsel would call him back to the question. He also acknowledged that some of the alleged items of mistreatment had never been related to his attorney.

The true test of admissibility of a confession is whether the confession was made freely, voluntarily, and without compulsion or inducement of any sort. (*Haynes v. State of Washington*, 373 U.S. 503, 83 S.Ct. 1336, *Malloy v. Hogan*, 378 U.S. 1, S.Ct. 1489) Volunteered statements of any kind are not barred by the Fifth Amendment to the United States Constitution. *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602.

The awareness of right to remain silent is now a threshold requirement for the intelligent decision as to its exercise where there is an incustody interrogation (*Miranda v. State of Arizona, id.*) *but* this requirement has been held to be applied prospectively only from the date of the *Miranda decision* (*see Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed 2d *Davis v. State of North Carolina*, 384 U.S. 737, 86 S.Ct. 1761 (1966). The attention of the Court is directed to the fact that these respondents were tried and sentenced on June 17, 1961; therefore, the requirement does not apply in this case.

As far as the law of Louisiana is concerned, it is well settled that the question as to whether a statement or confession was "given freely and voluntarily is a question of fact, which addresses itself to the dis-

cretion of the Trial Judge." *See: State v. Edwards*, 232 La. 577, 94 So.2d 674; *State v. Isacc Peart*, 232 La. 111, 93 So.2d. 920. The State Trial Court found that the statements were free and voluntary.

The facts of these cases, like the facts of *Johnson v. State of New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966), show that the confessions should not be held as involuntary. In the Johnson case, the relators therein gave confessions which were offered in a joint trial for felony murder, like the instant case. The judge held a hearing out of the presence of the jury on the voluntariness of the confession, like the judge did in the instant case. The only difference being that the relators in the Johnson case did not bring into the hearing alleged violation until they filed collateral attacks upon the trial for alleged violation of their constitutional rights. In this case the respondents did not set forth any alleged violation of their rights during the hearing of the Trial Judge in which he determined that the confessions were admissible.

It was admitted by each that they had not testified to the alleged acts on the hearing before the judge which they testified to before the jury. From a reading of the facts which are set out above and a reading of the testimony, the court will see that the alleged mistreatment is obviously false. It would seem that if the alleged acts had been committed, the respondents surely would have testified to the facts on the hearing before the judge on the admissibility of the confession and further would surely have told their counsel of the alleged acts. Progue acknowledged that some of the

alleged facts of mistreatment which he testified about before the jury had never been related to his attorney. Once he started weaving his story, he was carried away by his own story and related being questioned on a day which he had previously acknowledged that he was not questioned at all by anyone and even after having had his earlier testimony read back to him, he continued to stick by the story he was then telling.

On rebuttal before the jury, Pynes and Roberson specifically and emphatically denied each of the false statements of abuse made by Progue against them and of the other respondents. This is a question of fact and also a question of credibility of witnesses. The overwhelming evidence cannot be destroyed by the vague assertions made by Williams, nor the false exaggeration made by Washington and Progue, in the presence of the jury, on matters not testified to by them out of the presence of the jury.

The real question is whether or not anything transpired between the time of the arrest of any one of these respondents and the time they made any statements which coereed or induced him to make a statement. If there was no such occurrence, then the statements were admissible.

For example, in *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, the accused was arrested without a warrant and placed in jail in Texas. He could not read or write English and four days later he made a confession in the Texas jail about committing a homicide in Nebraska. His statement was written in English, it

was read to him in Spanish, and he signed it. He was kept in jail four more days in Texas with no homicide charge being filed. After being taken to Nebraska, he was questioned again by three Nebraska officers, through an interpreter, and he confessed again, which was thirteen days after his original arrest. Finally, he was taken before a County Judge for a preliminary hearing twelve days later, making a total of 25 days from the time of his arrest until the time he was taken before a magistrate. Nevertheless, the United States Supreme Court held that the confession (made in Texas) was admissible in evidence, because nothing took place that coerced him into making a statement. *See also: Crooker v. California*, 357 U.S. 444, 2 L.Ed. 2d, 1448, 78 S.Ct., 1287 (death sentence affirmed); *Ashdown v. Utah*, 357 U.S. 426, 2L.Ed. 2d., 1443, 78 S.Ct. 1354; *Stein v. New York*, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct., 1077 (death sentence affirmed); *Brown v. Allen*, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (death sentence affirmed); *Stroble v. California*, 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599 (death sentence affirmed); *Taylor v. Alabama*, 335 U.S. 352, 92 L.Ed. 1935, 68 S.Ct. 1415; *Lyons v. Oklahoma*, 322 U.S. 596, 88 L.Ed. 1481, 64 S.Ct. 1208; *Lisenba v. California*, 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280 (death sentence affirmed). *See also* Annotation in 1 L.Ed. 2d, 1735, at p. 1743 and 1745.

In *Lisenba v. California, supra*, the original arrest was on April 19, and, after refusing several times to make a statement, the defendant made a confession on May 2, fourteen days later. The United States

Supreme Court held that the statement and confession of the accused was not caused by his detention for any specific number of days, nor by his being questioned on several different days. On the contrary, the Court held that he actually made his confession because of the mounting evidence, (including the statement of an accomplice) with which he was confronted. The Court further held that it was because of this mounting evidence that he voluntarily made his own decision to give a full statement.

The reasoning in that case is peculiarly applicable to respondents Williams and Progue in this case. This is especially true of Progue who knew that the other respondents had made statements and reenactments, that certain garments and his (Progue's) pistol had been recovered and identified, and that statements had been signed not only by Williams and Washington but by Melvin Dixon, Herbert Young, James Henderson, and Pearlie B. Small, the latter being the girl friend of Progue.

We now turn to the question of the alleged unlawful search and seizure. The relators allege that the gun used in evidence was secured by an unlawful search and seizure. This is not true, as the gun was in the possession of Deputy Vol Dooley of Bossier Parish. He had taken the gun from a negro man, a person other than relator, as a concealed weapon, who had won it in a dice game. It was lost in the dice game by a negro who had purchased it from Progue. As this was the chain of events which led to the recovery of the gun it could not be claimed by respondents herein

that it was illegally seized as it was not taken from them.

Next we look to the facts surrounding the obtaining of Williams' checked car coat. Williams told the officers that the coat that he had on at the time of the murder had been given to his brother. He went willingly with the officer to identify the coat which was at his brothers' house. This was not his home, therefore, it was not an unlawful search and seizure but was voluntarily given to the officer by the brother.

Washington's coat was also introduced into evidence. After Washington had given his confession he agreed to go with the officers and point out the coat he wore on the night of the murder. An unlawful search and seizure is one made without the consent or permission of the accused. If he consents to the search or seizure then it is lawful and there is no need for a search warrant. This is certainly the case of Washington. He cannot at this late date urge that he did not consent to point out the coat.

The officers went to the home of Progue's girl friend and there made upon her the request for the coat which he was wearing the night of the murder and she gave it to them. This home was let to her and not to Progue. She was in full charge of it; therefore, when she turned the coat over to the officers and there was not an unlawful search and seizure. It is stated that she was forcefully abducted from the house but this was not the case.

Petitioner further argues that in the event of

any question as to the application of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 it should be noted that the United States Supreme Court held in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 that the rule of Mapp case was to have prospective application only. The Mapp case was decided several days after the conviction of the respondents herein.

It appears that in considering the "totality of the circumstances", the Federal District Court's decision is primarily based upon the length of time respondents were in custody and occasional brief interrogations. The lower court has completely excluded from its decision the *alleged physical* mistreatment of Appellees and makes no reference to any physical or mental infirmity of respondents which might cause them to succumb to any subtle coercion that might be applied against them by the authorities.

It is submitted that no cases have been found where a Court has failed to buttress its opinion holding a confession to be involuntary with some discussion regarding some mental or physical infirmity of the accused. For example, the lower Court relies upon *Clewis v. Texas*, 386 U.S. 707 (1967) and *Davis v. North Carolina*, 384 U.S. 737 (1966), both of which involved different factual situations than those presented here.

In *Clewis*, the Supreme Court made much of the *physical coercion* employed against the accused, stating that his "faculties were impaired by inadequate sleep and food, sickness *and* (emphasis supplied) long

subjection to police custody. . . ." Of further importance was the fact that the accused had only a fifth grade education.

In *Davis*, the Court also talked of substantial coercion influences, one of which was *lack of food* which "may well have had a significant effect on Davis' physical strength and therefore his ability to resist."

In light of the above, petitioner shows that the holding of the lower Court is a departure from the prior rulings of the U.S. Supreme Court.

Of course, prior to *Miranda v. Arizona*, 384 U.S. 436 (1966), a confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. *Ziang Sung Wan v. U.S.*, 266 U.S. 1; *Hopt v. Utah*, 110 U.S. 574; *Sparf & Hansen v. U.S.*, 156 U.S. 51; *Pierce v. U.S.*, 160 U.S. 355; *Wilson v. U.S.*, 162 U.S. 613; *Bram v. U.S.*, 168 U.S. 532; *Hardy v. U.S.*, 186 U.S. 224; *Powers v. U.S.*, 223 U.S. 303; *Bilokumsky v. Tod*, 263 U.S. 149.

The basic question is simply whether the will of the accused has been overborne. *Lyman v. State of Ill.*, 372 U.S. 528; *Haynes v. State of Washington*, 373 U.S. 502.

It is submitted that the lower Federal Court has allowed the recent U. S. Supreme Court decisions regarding the voluntariness of confessions to be applied retroactively, the Court determining that the respondents in the instant case did not receive a "fair trial"

under *present standards*, as opposed to whether a "fair trial" was granted these respondents under the law as it existed at the time of their trial in 1961. Under *Johnston v. New Jersey*, 384 U.S. 719, such a retroactive application of *Miranda* and related decisions is not authorized.

The lower Court has also pointed out that respondents were not brought before a committing magistrate "without unnecessary delay". It is submitted, however, that the rules for the Federal Courts laid down in *McNabb v. U.S.*, 318 U.S. 332, and *Mallary v. U.S.*, 354 U.S. 449, (requiring exclusion of confessions if an accused is not promptly brought before a committing magistrate) have never been applied to the States. *Gallegos v. Nebraska*, 342 U.S. 55; *Stein v. N.Y.*, 346 U.S. 156; *Carpenter v. U.S.*, 264 F. 2d 565, cert. den., 360 U.S. 936; *Cato v. Alvis*, 288 F. 2d 534; *Smith v. Heard*, 315 F. 2d 692; *U.S. ex rel Smith v. New Jersey*, 322 F. 2d 810; *Young v. Wainwright*, 326 F. 2d 255; *Ralph v. Pepersack*, 335 F. 2d 128; *Crooker v. California*, 357 U.S. 433. The states have been left to determine whether confessions which have been made while the accused is in custody were, in fact, voluntary.

It is submitted that no undue weight should be given to a failure to timely arraign, or to formulate an exclusionary rule of evidence based upon *McNabb* and *Mallary* which would cause a confession, otherwise voluntary, to be *considered involuntary, due to the mere passage of time.*

It is further submitted that the lower Court has placed undue emphasis upon the alleged incarceration of Progue's common-law wife. It is apparent that Progue's confession was not induced by any coercion or pressure, but simply because the evidence was mounting against him. By the time Pearlie B. Small came to the Police Station, Washington and Williams had already confessed, thereby implicating Progue. Also, Pearlie B. Small had identified Progue's coat and pistol.

As with the accused in *Lisenba v. California*, 314 U.S. 219, the interrogation of Progue "would never have drawn an admission from him had his confederate not made a statement." The "will was not overborne," through coercion by the authorities in relation to Progue's common-law wife, or any other pressure or intimidation. Progue's statement was made simply because of the evidence against him. (Compare Progue's testimony quoting Police Commissioner Downs, who had known Progue prior to the arrest, this being the day before Progue made his statement: "Well, Progue, if you haven't done it, don't say you done it, because they would have to prove it." That certainly is *not* any coercion by which his "will was overborne.")

Aside from the points set forth above, it appears that no real coercion was employed against any of the respondents. Progue made a statement because of the evidence against him. Williams and Washington voluntarily revealed their part in the crime. Had there been any intimidation or coercion, it appears that they would have made this known to the members of the

news media who were present at the time of the re-enactments at the scene of the crime. They could have "told the world" of their plight, had their action not been voluntary.

It is further submitted that although it is the duty of this Court to examine the entire record to determine the voluntary nature of the statements, this examination should be limited to a determination of whether the trial court and jury *could reasonably conclude* that the confessions of these respondents were voluntary. The fact that there is evidence which *might* justify a contrary conclusion is immaterial.

The real question is whether the conclusions of the State Trial Court and jury are so illogical and unreasonable that to give them effect would work that fundamental unfairness which is at war with due process. *Lisenba v. California*, 314 U.S. 219; *Lyons v. Oklahoma*, 322 U.S. 596.

In the instant case ample evidence was submitted to the State Trial Judge, out of the presence of the jury, and subsequently before the jury, for a determination of the question as to whether the statements were made freely and voluntarily without inducements or coercion.

The State Trial Judge, relying upon the jurisprudence *in existence at that time*, followed the law as announced by the United States Supreme Court and the Louisiana Supreme Court. Without exception, in every case decided prior to 1961 in which a confession had been excluded, there had been *undisputed*

facts showing *mistreatment of the accused* or some physical or mental *defect on his part.* Such facts were *not true in this case,* as found by the State Trial Judge and jury. Even in *Culombe v. Connecticut* (June 19, 1961), 367 U.S. 568, 6 L. Ed. 2d. 1037, 80 S. Ct. 1860, (decided two days after the jury verdict in this case which decision encompassed four separate United States Supreme Court opinions), the accused was a mental *defective,* the officers used *subterfuge* upon him, they acknowledged that the *detention was to elicit a confession by every possible means,* and his *request for counsel* was *frustrated by the police. None* of these elements were *present in the instant case.*

In the instant case, *these defendants were not* mentally defective, weak, suggestible or afraid of their co-defendants (as in *Culombe v. Connecticut*). Washington was twenty-seven years old and in full possession of his faculties. Progue was twenty-seven, had served one term in the State Penitentiary for burglary in 1955 and had had contact with police officers. Williams was twenty-four and his testimony shows that he had considerably more than average intelligence. *Williams* even stated that he had prayed about the matter and, *of his own volition, sent for the Chief* of Police in order *to make his statement,* long after any interrogation and after a night's rest, (State Transcript, page 481). These men were not held incommunicado; part of the time two of them were in the same cell; part of the time one or more of them had a cell surrounded by a walk-around and by which

they could pass messages and cigarettes back and forth to persons in cells on each side. Only on one occasion was any one man questioned for more than an hour. There were *some days* on which *not any of them were questioned* at all by anyone. They were each given an opportunity *to call for their attorney* and an *opportunity to use to telephone.* In fact, *Progue's common-law wife told one of the officers that Progue had called her by telephone.*

Before each man made his statement to the *coroner* he was notified that he did not have to make a statement unless he wished to do so voluntarily. *This is the same as being notified of his right to remain silent.* (This case was tried long before *Escobedo and Miranda.*) The State contends that an arrest without a warrant, failure to advise the accused of their constitutional rights (to have an attorney, to remain silent, etc.), and failure to take the accused before a Committing Magistrate, (even though the last thing might be a violation of State law) *do not* void a subsequent confession. See *Smith v. Heard* (1963-C.A.5) 315 F. 2d. 692; (*Death* sentence, affirmed), *Young v. Wainwright* (1964-C.A. 5) 326 F. 2d. 255, (3 *Death* sentences, affirmed), and *Cato v. Alvis,* (1961-C.A.6) 288 F.2d. 530.

In *Cato v. Alvis, supra,* the accused *complained* that he was subjected to "*persistent and prolonged interrogation*" and that he was "*prohibited from seeing his purported wife* until after he had made a statement." The Court found, relative to his common-law wife, that "the officers were holding her as a witness

and would not let her talk to him until they had his story." (He also complained as to failure to notify him as to right to an attorney, to remain silent and to be taken before a Committing Magistrate.)

Nevertheless, the Court held that the statements were admissible in evidence, the court relying upon *Gallegos v. Nebraska*, *Stein v. N.Y.*, *Lyons v. Oklahoma*, and *Lisenba v. California*, which are the same cases relied upon by the State of Louisiana herein and which were affirmed in *Culombe v. Connecticut*. These cases are *not* overruled or modified.

The Court of Appeals for the Fifth Circuit has held that

> ". . . it is the illegal detention *in certain circumstances* which will vitiate a confession, *not* the illegal arrest and *subsequent detention in every case.*
>
> "There *must also be a causal connection* between the failure to take before a magistrate and the coerced confession." *Smith v. Heard, supra.* (Emphasis supplied.)

Again, we come to the crux of the question of whether these confessions were voluntary, i.e., was the will of each accused overborne by some *improper action* on the part *of the authorities* which *caused* the accused to confess. We submit *not*. As the Court stated in *State v. Traub*, 151 Conn. 246, 196, A. 2d. 755 (1963), which language was quoted with approval in *State v. Vangen*, 433 P. 2d. 691 (1967):

> "Even though a detention is illegal, if the confession is truly voluntary and the *causation factor*

of the illegal detention is *so weak*, or has been so attenuated as not to have been an operative factor in causing or bringing about the confession, then the connection between any illegality of detention and the confession may be so lacking in force and in intensity that the *confession would not be the fruit of the illegal detention.* (151 Conn. page 250, 196 A. 2d. page 757." (Emphasis supplied.)

Here, Williams and Washington voluntarily revealed their part in the crime; there is no believable evidence to indicate that anything done by the authorities caused them to implicate themselves in the crime. Their wills were *in no manner overborne by* the action of *the authorities.* As to Progue, his confession was made, not because of any improper influence by the authorities, but due to the evidence against him. When confronted with this evidence, he knew there was no point in contending that he was innocent. His situation was similar to that of the accused in *Lisenba, Gallegos* and *Vangen,* supra. It was *not any improper action* of the authorities which "overbore his will" or *"caused" him to confess, but the* continually *mounting evidence* with which he was confronted. Faced with this evidence, *he voluntarily elected* to make his confession.

In connection with the detention of these three respondents, it must be remembered that the police officers who were investigating were making a thorough investigation of the crime and of the stories related to them by Washington and Williams. This procedure of holding an accused while an investigation progresses

is not prohibited at this time, even by *Miranda*. Also, the Court will note that *in none of the statements* given by these three respondents *did any admit* that *he actually struck the blows which killed Jang Gow*. Had the police officers desired an actual confession, it would appear that these respondents would have been forced and compelled to state who actually killed the victim of the crime. However, this was not the case. These respondents voluntarily related their respective parts in the crime, but none admitted having actually struck the fatal blows and *none of these respondents were compelled or forced to do so by the authorities.*

Turning now to a discussion of an additional one final point in connection with the issue of illegal search and seizure, relator presents as part of this writ the following reasons:

Since this case was tried in the State Court in June, 1961, (which was prior to the decision in *Mapp v. Ohio*), Louisiana was not bound by the exclusionary rules set forth therein and, therefore, the question of whether the arrests were based on something less than reasonable cause was irrelevant and immaterial. Nevertheless, the record herein shows that Detective Roberson had certain leads which he discussed with his superior, Major Borland, which convinced him that there was reasonable cause to believe that these defendants had committed this felony and, *based upon these leads, the arrests were made.* In this connection, the statement of the Federal District Court that these men were booked on "suspicion of homicide" and were,

therefore, illegally detained, should be considered in light of the following language from *Ralph v. Pepersack* (1964-C.A.4) 335 F. 2d 128 (*Death* sentence, affirmed):

> "At the time of Ralph's arrest, the District of Columbia had *no statute* or ordinance *prohibiting arrest for investigation* where probable cause was present . . . of course, there is no such crime as investigation, but this description given by the officer does not go to the question of probable cause. . . . *There is no constitutional prohibition against arrest for investigation* where probable cause exists. Certainly *not every official impropriety* gives rise to a finding that due process has been denied." See also *Stevens v. Warden*, 366 F. 2d. 565, 1966. (Emphasis supplied)

The *Trial Judge* in the State Court specifically *ruled* that there were *no illegal arrests* and *no illegal detention* (See State Transcript, page 675). However, *this was completely ignored by the Federal District Judge*, even though the State Supreme Court affirmed the conviction. In other words, the Federal District Judge did not accept the State Court's authority as to the law in Louisiana in 1961 in this regard. We submit that the Federal District Judge has inadvertently been guided by 1967 Federal standards instead of applying the Louisiana law which existed at the time of these arrests, as should have been done under *Ralph v. Pepersack*, supra, and as the Fifth Circuit Court did in *Smith v. Heard* (1963-C.A. 5) 315 F. 2d. 692 (*Death* sentence, affirmed).

CONCLUSION

Considering the gravity of several errors by the Federal District Court, now affirmed by the United States Court of Appeal for the Fifth Circuit, the petition for a writ of certiorari should be granted.

Respectfully submitted by;

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CERTIFICATE

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, counsel for relator herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of August, 1968, I served a copy of the foregoing petition for certiorari to the Supreme Court of the United States on Albert George Progue, Johnny James Williams and Roosevelt Washington, respondents herein, by mailing a copy thereof, in a duly addressed envelope, with first class postage prepaid, to Dan A. Spencer, counsel of record for said Progue, Williams and Washington, at Suite 7, Dixie Building, 1639 Kings Highway, Shreveport, Louisiana.

Baton Rouge, Louisiana, this ..... day of August, 1968.

GEORGE A. BOURGEOIS,
Assistant Attorney General,
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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25534

WINGATE WHITE, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA,
Appellant,

v.

ALBERT GEORGE PROGUE, ET AL,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana

(May 16, 1968.)

Before TUTTLE and SIMPSON, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: The State of Louisiana appeals from a judgment of the United States District Court for the Western District of Louisiana vacating a judgment of conviction of the three appellants by the state courts of Louisiana because of the failure of the state trial court to suppress statements elicited from appellants while in custody.

In this pre-*Miranda* case, we conclude that the trial court properly applied the principles enunciated

by the Supreme Court in *Davis v. State of North Carolina*, 384 U.S. 737; *Fikes v. State of Alabama*, 352 U.S. 191; and *Clewis v. State of Texas*, 386 U.S. 707, in determining the voluntariness of the confessions here in question. We agree with, and approve of, the opinion and judgment of the trial court as published at 271 F. Supp. (W.D.La.) 176, sub. nom. *Albert George Progue, Johnny James Williams and Roosevelt Washington v. J. D. Middlebrooks, Acting Warden, etc.*, and we AFFIRM the judgment based on that opinion.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT
OF LOUISIANA
SHREVEPORT DIVISION
CIVIL ACTION

No. 12,540

ALBERT GEORGE PROGUE,
JOHNNY JAMES WILLIAMS,
AND ROOSEVELT WASHINGTON

v.

J. D. MIDDLEBROOK,
ACTING WARDEN OF THE
LOUISIANA STATE PENITENTIARY

DAN A. SPENCER,
Suite 7 Dixie Building,
1639 Kings Highway,
Shreveport, Louisiana 71103.
FOR PLAINTIFFS

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JOHN A. RICHARDSON,
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Shreveport, Louisiana 71101.
FOR DEFENDANT

BEN C. DAWKINS, JR.,
CHIEF JUDGE

OPINION ON THE MERITS

In the early morning hours of December 14, 1958, Jang Gow was brutally beaten in his combination restaurant-home. As a result of his injuries, he died December 23, 1958, without ever regaining full consciousness.

More than two years later, petitioners Albert George Progue, Johnny James Williams, and Roosevelt Washington were arrested on charges of "suspicion of homicide." During the course of their subsequent trial for the murder of Jang Gow, petitioners moved to exclude from evidence certain statements elicited while they were in the custody of the police. Petitioners claimed that these statements had not been voluntarily made, and that their use against them at the trial would deny them due process of law, as guaranteed by the Fourteenth Amendment to the Constitution.

Relative to the issue of voluntariness, evidence was taken by the court outside of the jury's presence, and the motion was overruled.[1] The question of voluntariness was then presented to the jury, which, by its general verdict of guilty resolved the question against petitioners. Motions in arrest of judgment and for

[1]The trial judge's opinion on voluntariness is set forth at pages 674-677 of the state transcript. All further references to transcript page numbers will be to the numbers of the State transcript.

new trial were overruled, and the trial judge sentenced petitioners to death by electrocution. On appeal, the Louisiana Supreme Court reviewed the record and affirmed the conviction.[2] The Governor of Louisiana has never signed a warrant for their execution.

Petitioners, having been denied writs of habeas corpus in State Court, filed writs of habeas corpus in the Eastern District of Louisiana on December 5, 1966. The matter was then transferred to this court pursuant to the provisions of 28 U.S.C. § 2241, as amended by Public Law 89-590 of the 89th Congress. Since the parties stipulated that the State Court record contained all of the relevant facts and that they chose to rely solely upon that evidence, no evidentiary hearing was held in this court.[3] Extensive briefs were filed, however.

The question for our determination is whether, considering the "totality of the circumstances,"[4] petitioners' statements were involuntary and should have been excluded. In order to reach a decision on this point, we need go no further than the State's version of the facts. However, petitioners' claims of physical abuse and coercion will be summarized to indicate the conflicting testimony surrounding the custodial interrogations.

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[2] *State v. Progue*, 243 La. 337, 144 So.2d 352 (1962).

[3] *Townsend v. Sain*, 372 U.S. 293, 322 (1963).

[4] *Pikes v. Alabama*, 352 U.S. 191, 197 (1957). See also, e.g., *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Raynes* v. *Washington*, 373 U.S. 502 (1963).

The trial of this case was prior to the date of decision of *Miranda v. Arizona*, 384 U.S. 436 (1966), the requirements of which, therefore, are not directly applicable, *Johnson v. New Jersey*, 384 U.S. 719 (1966), although relevant on the issue of voluntariness, *Davis v. North Carolina*, 384 U.S. 737 (1966).

The arresting officer, and the State's chief witness, Sgt. R. L. Roberson, evidently was the person most closely associated with petitioners during the interrogation. The testimony of the other police officers was mainly corroborative of his testimony. Thus the following narrative of facts represents the gist of the State's version of the facts, and Sgt. Roberson's testimony.

Petitioners were taken into custody on March 17, 1961.[5] Washington was questioned briefly about his employment and asked to return the next morning at ten o'clock.[6] Progue and Williams were unofficially booked on "suspicion of homicide" when taken into custody, as was Washington when he returned voluntarily on March 18.[7] None of the petitioners were brought before a committing magistrate "without unnecessary delay" as required by La. R.S. 15:79-80

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[5] *Transcript*, 271-273. Although there is some evidence to indicate that it was in fact March 16, the preponderance of the evidence supports the conclusion that it was March 17.

[6] *Transcript*, 273, 316.

[7] *Transcript*, 354. There is, of course, no statutory authority in Louisiana for the arrest of a person for "suspicion of homicide." If there had been reasonable cause to justify an arrest for murder, it seems petitioners would have been booked for murder, rather than "suspicion of homicide."

(1950).[8] After petitioners had been taken into custody, they were placed in separate cells to prevent communication between them[9] and were not allowed to have visitors until they made statements.[10]

Washington, when first questioned at 10:00 a.m. on March 18, spoke of a conversation he had overheard between Progue and Williams[11] and signed a typewritten statement to that effect.[12] When questioned later that afternoon, he signed another statement relating to a different conversation.[13] Williams was first questioned at 2:00 p.m. on March 18 for approximately an hour, but would make no statement.[14] Progue was interrogated on March 18 for four

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[8]La. R.S. 15:79-80 (1956): "When a peace officer shall have made an arrest with a warrant, he shall, after the prisoner shall have been booked, bring him, without unnecessary delay, before the judge designated in the warrant.

"When any person shall have been arrested without a warrant, the peace officer, after he shall have caused him to be booked, shall bring him, without unnecessary delay, if the charge be such as to entitle the accused to a preliminary examination, before the judge having authority to sit as a committing magistrate in the case, otherwise, before the judge having trial jurisdiction thereof."

Sections 79-80 were replaced when the *Louisiana Code of Criminal Procedure* became effective January 1, 1967. *Cf.* Articles 228, 229, 230, *Louisiana Code of Criminal Procedure* (1967).

[9]*Transcript*, 452, 473.

[10]*Transcript*, 377, 456, 984.

[11]The statement implicated none of the petitioners in the Gow murder.

[12]*Transcript*, 317-318.

[13]*Transcript*, 318. This statement, too, implicated no one.

[14]*Transcript*, 300, 355.

hours, between 8:00 p.m. and midnight.[15] Although he was initially questioned about general matters and another unsolved murder in Shreveport, during the late evening hours he was told that he was being investigated in connection with the Gow killing.[16] He steadfastly denied any part in the murder.

Williams was again questioned on March 19 and 20, for about an hour each day, but still refused to make a statement.[17] Washington was questioned in the early morning hours of March 20, but made no incriminating statements.[18]

On the morning of March 21, Williams and Washington were driven to Baton Rouge, approximately 235 miles away, where they were questioned by State Police and took lie detector tests.[19] While in Baton Rouge, Williams and Washington were held in East Baton Rouge Parish Jail. They were returned to the city jail in Shreveport on the afternoon of March 24.[20]

On March 25 and 26, both Williams and Washington were interrogated, but made no statements.[21] Washington underwent further fruitless interrogation on March 27.[22] Both of them were again questioned

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[15] *Transcript*, 274, 282, 335.

[16] *Transcript*, 282, 333.

[17] *Transcript*, 300, 355-356.

[18] *Transcript*, 320.

[19] *Transcript*, 301-305, 321.

[20] *Transcript*, 305.

[21] *Transcript*, 306-307, 322-323.

[22] *Transcript*, 324.

on March 29, and still refused to make statements.[23]

While being questioned on March 30, Washington orally implicated all of the petitioners in the murder of Jang Gow.[24] One of the interrogators, Lt. Pynes, testified that immediately prior to Washington's statement, "I told him it would be in his best interest to make a statement." [25] The statement was recorded at 9:20 p.m. on March 30.[26]

After receiving and recording Washington's statement, the police then began interrogating Williams, telling him that Washington had implicated him, but Williams still refused to make a statement.[27] The police then took Washington home to recover some clothes that he supposedly wore on the night of the murder. When Washington told them that Williams had been wearing a particular type of coat on that night, the police returned to the jail and took Williams to his brother's house, where he recovered the coat.[28]

Progue, who had not been questioned since March 18, was questioned for about an hour between 11:00 p.m. and 1:00 a.m. after the police had recovered the clothing belonging to Williams and Washington.[29] He was told that one of his co-defendants had made a

[23] *Transcript*, 325, 360.
[24] *Transcript*, 326, 407.
[25] *Transcript*, 973.
[26] *Transcript*, 326.
[27] *Transcript*, 308.
[28] *Transcript*, 308.
[29] *Transcript*, 275, 308, 283-284.

statement, blaming him for the actual murder.[30] When Progue still refused to confess, the police returned to Williams' cell and interrogated him without results.[31] At approximately 2:00 a.m., Progue was again questioned to no avail.[32]

Williams made his first statement about 10:00 a.m. March 31, and this statement was then recorded.[33] On the afternoon of the thirty-first, Williams and Washington were taken to the scene of the crime where they re-enacted the crime before the Public Service Commissioner, Police Chief, District Attorney, Sgt. Roberson, Lt. Pynes and representatives of the news media.[34]

That same afternoon, Progue was again questioned by the police, but he still maintained he had nothing to do with the crime.[35] On April 1, all of the petitioners were again questioned, and Washington identified a pistol he said Progue used to murder Gow.[36] When Progue was questioned on April 1, he was again told that Williams and Washington had signed statements, re-enacted the crime and were blaming the murder on him.[37]

Actually, Washington and Williams signed type-

[30] *Transcript*, 283-284.
[31] *Transcript*, 308.
[32] *Transcript*, 336.
[33] *Transcript*, 310, 361, 415.
[34] *Transcript*, 312, 328, 417.
[35] *Transcript*, 277, 287, 336.
[36] *Transcript*, 278, 287, 313, 330, 340.
[37] *Transcript*, 287, 340.

written statements on April 2.[38] The testimony of Lt. Pyne indicates how these signed statements were used in the interrogation of Progue after they were procured:

> "Well, sir at that particular time we had gotten statements from Melvin Dixon and Roosevelt Young on the pistol—Herbert Young, and we had typed up the statements that Williams and Washington had made, and we did not allow him to read the statements. However, we showed him that we did have statements from them, and that they showed that he was lying, and that he had best tell us about the thing. And he made several excuses as to where they would be trying to involve him in the thing, and so forth. And we explained to him at that time that so long as he refused to talk about the thing that we had no alternative except to try to check his alibi and that he would have to remain in jail. And we took him back to his cell." [39]

During further interrogation on April 3, Progue asked to speak to his mother and wife, but that request was refused.[40] However, ostensibly to "give Mrs. Progue a place to sleep," the police took her into custody on April 3 and placed her in a cell in the female section of the same jail in which Progue was incarcerated.[41] Mrs. Progue, who had four small children at home, was expecting her fifth child in two months.

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[38] *Transcript*, 313, 331, 420, 428.
[39] *Transcript*, 433.
[40] *Transcript*, 435.
[41] *Transcript*, 436.

After being told of his wife's incarceration, Progue made an incriminating statement later in the evening of April 3.[42] After this confession, Progue was allowed to visit with his wife and family, and his wife was released from jail.[43]

The facts above related are, of course, admitted by the State. The State denies the use of either physical or mental abuse, threats or promises, and asserts that the confessions were freely and voluntarily given.

Petitioners, however, contend that they were subjected to physical abuse and threats,[44] which we will not detail because these contentions are unnecessary to our decision. Petitioners also assert that they were promised by the police that if they co-operated and signed confessions, the District Attorney would be lenient and they would receive no more than a two or three-year sentence.[45] When questioned about why he had confessed after eighteen days of denying any

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[42]*Transcript*, 338, 343, 436. During the first part of Sgt. Roberson's testimony (*Transcript*, 279), he said that Progue's first confession was on April 2, but he later changed that date to April 3, and this is the date also given by Lt. Pynes.

[43]*Transcript*, 437.

[44]For Williams' testimony, see *Transcript*, 547, 549, 552, 564, 1000, 1004, 1010, 1015, 1039, 1044, 1048, 1049.

For Washington's testimony, see *Transcript*, 572, 1069-1075.

For Progue's testimony, see *Transcript*, 592-594, 596-598, 603-605.

[45]For Williams' testimony, see *Transcript*, 550, 561, 563-564, 1008, 1019.

For Washington's testimony, see *Transcript*, 1049-1075.

For Progue's testimony, see *Transcript*, 598, 608-609.

part in the Jang Gow murder, Progue testified as follows:

". . . they went and picked my wife up, and then they went and come got me. And X come upstairs to the investigation room up there. They were bringing my wife out, and they carried me in.

"They said, 'We have got your wife up here . . . I am going to lock your wife up on a One Thousand Dollar material witness bond . . . .You know nobody ain't going to get her out of jail, don't you?'.

"I said, 'Yes, sir, I know that.'

"He said, 'She will stay there till you go to trial. . . . You will go to trial sometime over in next year. It will be in '62. . . . You are going to stay right here in the straight jacket. . . . I don't have nothing to do. This is my job. . . . I can question you as many hours as necessary. Don't make no difference. I don't care whether you sleep or not. That is all I am going to do, is sit here and question you.'

"I told him, 'Sergeant, I don't think that is right for you to lock my wife up in jail away from my family. . . . We have four kids. . . . The oldest one is not but nine years old. . . . Well, if I sign a statement. . . . will you let my wife go out of jail?'

"He said, 'If you make a statement . . . I will let your wife go out of jail . . . I guess you are going to make one.'

"I say, 'I am not going to lie on myself, . . . You will just have to lock her up and me, too.'

"And he told me, said, 'Progue. . . . You better put some kind of lie on this paper, whether it is the truth or ain't the truth, because, Boy, you are going to burn,' like that.

"But, I sat about thirty minutes. I was thinking about my wife. I said, 'Well, I will make a statement if you are going to lock my wife up . . .'" [46]

Turning now to a consideration of the authorities upon which we must base our decision, we note that in *Clewis v. Texas*, 386 U.S. 707 (1967), Clewis' conviction at his pre-*Miranda* trial was reversed because of the involuntariness of a statement introduced in evidence. The Supreme Court concluded that the following factors required a determination that the confession was involuntary. Clewis, a Negro with only a fifth-grade education, had never been fully advised of his right to counsel, had been held thirty-eight hours before being taken before a magistrate to be charged as required by Texas law, and the intermittent interrogation for approximately ten days was specifically designed to elicit a signed statement.

In *Davis v. North Carolina*, 384 U.S. 737 (1966), a Negro of low mentality was taken into custody and kept in a detention cell for sixteen days, where he spoke to no one but the police, who interrogated him intermittently each day. Finding that Davis had never

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[46] *Transcript*, 603-604. For purposes of clarification, the paragraph form was supplied to set forth Progue's testimony. For further testimony by Progue on this matter, see *Transcript*, 605, 610, 624-625, 629, 632, 634.

been advised of his right to remain silent or to counsel during this sixteen days, his confession was ruled involuntary. The following language was used by the Court:

> "The facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court. *E.g.*, *Culombe v. Connecticut*, 367 U.S. 191 (1957); *Turner v. Pennsylvania*, 338 U.S. 62 (1949). We have never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as was involved in this case." [47]

In light of *Clewis* and *Davis*, and the authorities cited therein, we conclude that the statements introduced at petitioners' trial were involuntary and should have been excluded. This conclusion is reached without considering the claims by petitioners of physical abuse, threats and promises. We consider only the State's version of the facts.

The State admits that petitioners were taken into custody on March 17 and incarcerated without being charged or brought before a committing magistrate as required by La. R.S. 15:79-80 (1950).[48] Although they were unofficially booked on "suspicion of homicide," there is no such crime in Louisiana. The truth of the

[47] 384 U.S. 737, 752 (1966).

[48] See Note 8, *supra*.

matter is that there was an unsolved two-year-old murder for which petitioners were incarcerated for investigation and interrogation. There is nothing in the record to support the assumption that there existed any more evidence than a rumor to connect petitioners with the crime—certainly much less than "reasonable cause" required for a warrantless arrest under Louisiana law.[49] It seems quite clear, therefore, that petitioners were illegally arrested and detained when they were taken into custody on March 17 and unofficially booked on "suspicion of homicide."

During the lengthy period of custodial interrogation, petitioners were never advised of their right to consult with counsel. Admittedly, until petitioners confessed to the murder of Jang Gow, they had never been officially charged or booked with the commission of any crime, and they were neither allowed to have visitors or make telephone calls. It was only after thirteen days of intermittent interrogation that Washington made an incriminating statement. With Williams, it was after fifteen days, and Progue, after eighteen days.

The circumstances surrounding the incarceration of Progue's wife and his subsequent confession are indeed suspicious. The police admittedly placed her in jail on April 3, explaining that it was necessary in or-

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[49]Article 213, *Louisiana Code of Criminal Procedure* (1967).

Cf. La. R.S. 15:60 (1950), the statutory provision effective at the time petitioners were taken into custody.

der to give her a place to sleep.[50] The fact that Progue, after consistently denying any knowledge of the crime for eighteen days, confessed soon after his wife was incarcerated certainly compels the conclusion that she was jailed to pressure Progue into implicating himself.

Undoubtedly, therefore, the statements elicited during the extended period of custodial interrogation were involuntary. The introduction of those statements at petitioners' trial deprived them of due process of law, as guaranteed by the Fourteenth Amendment. The decisions cited by the State we consider to be either inapplicable to these facts or impliedly overruled by subsequent decisions of the United States Supreme Court.

Therefore, under compulsion of the Supreme Court decisions cited above, the writs of habeas corpus must be granted, but the State of Louisiana shall retain the right to retry petitioners within six months from the finality of this ruling. Consistent with retention of that right, the State has the additional right to keep petitioners in custody pending retrial.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, on this 28th day of July, 1967.

CHIEF JUDGE

[50] *Transcript*, 436.

STATE OF LOUISIANA

v.

ALBERT GEORGE PROGUE,
ROOSEVELT WASHINGTON AND
JOHNNY JAMES WILLIAMS

No. 45892

SUPREME COURT OF LOUISIANA

June 29, 1962.

Rehearing Denied Oct. 3, 1962

Paul G. Lee, Loret J. Ross, Eugene J. Coen, Shreveport, for defendants-appellants.

Jack P. F. Gremillion, Atty. Gen., M. E. Culligan, Asst. Atty. Gen., John A. Richardson, Dist. Atty., Albert S. Lutz, Jr., C. J. Bolin, Jr., Asst. Dist. Atty., for plaintiff-appellee.

HAMITER, Justice.

Albert George Progue, Roosevelt Washington, and Johnny James Williams were jointly indicted and prosecuted for the murder of one Jang Gow, a Chinese restaurant owner and operator. The theory of the prosecution, as explained by the district attorney in a bill of particulars furnished pursuant to defense motions, was that early in the morning of December 14, 1958 the three accused men acting together forced their way into the combination living quarters and cafe of the decedent, situated at 1038 Texas Avenue in Shreveport, for the purpose of robbing him; that upon Gow's refusal to open a safe they severely beat him about the face, neck and head with their fists

and also with a pistol carried by one of them, as a result of which beating Gow died on December 28, 1958; and that the defendants were successful in accomplishing the planned robbery in that they removed and carried away money from the cafe's cash register.

The jury, after a lengthy trial, found the accused persons guilty as charged. And the judge sentenced each to death by electrocution.

On this appeal the defendants are relying on eleven bills of exceptions for the reversal of their convictions and sentences. Three other perfected bills have been expressly abandoned.

Defense counsel, following their appointment by the district court, first filed motions to quash, to elect, for a bill of particulars, and for a severance. When these motions later came on for hearing during the morning of May 24, 1961 such counsel requested a delay so that they could obtain a court reporter to take down and transcribe the oral arguments to be made thereon, as well as any remarks by the judge, although no formal motion for securing the services of a reporter had been submitted previously. The judge refused this request, and the refusal forms the basis of bill of exceptions Number 1.

In his per curiam to this bill the judge states: ". . . The Court did *not* refuse to allow the Court Reporter to be present during oral argument on certain preliminary motions. The Court *merely refused to delay the arguments* until the reporter arrived. Shortly after oral argument began, the Court Report-

er *did arrive* and *did take down* all the remainder of the oral argument, which constituted almost all of the argument except for the opening few minutes.

. . .

". . . the Court Reporter *was* present and did take down almost all of the proceedings on May 24, 1961, during oral argument on certain preliminary motions. This is seen by quotations from such arguments found in Bills of Exceptions 2 and 3.

". . . the Court Reporter did actually take down *almost all* of *the oral argument* on May 24, 1961, as well as *all of the testimony* and evidence adduced on each day of the trial itself."

[1] The statutory law (LRS 15:555 and 556) and decisions relied on here by defense counsel, in support of their contention that the trial judge's refusal of the requested delay constituted reversible error, have reference only to the taking down of testimony. In fact, they have cited no authority, and we have found none, which provides that an accused is entitled to have recorded all arguments and remarks of the judge made in connection with preliminary motions. Consequently, we perceive no error in the court's refusing the delay requested, particularly since a formal motion for obtaining a reporter had not been filed previously.

Moreover, there is no showing whatever that such ruling was prejudicial to the defendants. In fact, it is not even urged (in either the bill of exceptions or in counsel's brief here) that objections were made

and rulings had thereon during the absence of the reporter or that the accused were deprived of a record of irregular proceedings which might have formed the basis for a complaint justifying an annulment of the convictions and sentences.

Accordingly, we find no merit in the bill.

Bill Number 2 was reserved when the trial judge overruled the motions for a severance. As stated in the bill, the defendants contended under such motions that ". . . being forced to trial together would be prejudicial to their defenses in that the defendants' defenses were antagonistic, each to the other; and, that, as a result thereof, the MOTION FOR SEVERANCE should be granted and each defendant should be tried separately. That, in addition thereto, the defendants took the further position that being forced to trial together would deprive each defendant of the right of cross-examination as to the other defendants . . ."

Regarding the latter position, which will be discussed first herein, we know of no authority (and defense counsel have cited none) which permits a defendant when tried alone to call on cross-examination a codefendant. However, our statutory law does provide that in a joint trial each is privileged to examine the other, this, of course, being subject to the codefendant's right to refuse to take the stand and to give self incriminating testimony. LRS 15:474. Incidentally, it is appropriate to note that during the trial of the instant cause and in the presence of the jury each

of the three defendants voluntarily appeared as a witness in his own behalf, but that neither of the others (each was represented by separate counsel) attempted to examine him although the opportunity to do so was afforded.

With respect to the above stated first ground for the requested severance (alleged antagonistic defenses) there were attached to the motions the confessions of the defendants which the state intended to use in the course of the trial. Apparently, these constituted the only evidence before the court at the preliminary hearing concerning the question of whether the defenses were antagonistic; for the judge, in his per curiam to this bill, noted: "When this case was called for argument on the Motions for Severance there was no showing wherein the defenses would be, or were claimed to be antagonistic, other than the flat dogmatic conclusion to that effect by counsel.

. . .

". . . All three Coroner's statements (containing all three Police statements) were attached to the Motion for Severance filed initially on behalf of Johnny James Williams, which was adopted by the other two defendants. (It was stipulated all motions filed by any one defendant would be considered as being filed by each defendant. See Minutes of May 24, 1961, and May 29, 1961.)"

[2] LRS 15:316 provides: "Persons jointly indicted shall be jointly tried, unless the district attorney elect to place such persons separately upon trial,

or unless the court, upon motion of defendant, shall, after a hearing contradictorily with the district attorney, order a severance." And this court has often held that severance is not a matter of right, but that the granting or refusing of it is vested in the sound discretion of the trial judge whose ruling will not be interfered with unless manifestly erroneous and injurious to the accused. *State v. Cook et al.*, 215 La. 163, 39 So.2d 898 and the numerous cases therein cited. See also *State v. Taylor et al.*, 173 La. 1010, 139 So. 463.

[3-5] Of course, the judge's refusal to order a severance is subject to review by this court when it is asserted that he has acted arbitrarily. However, we have said: "The rule is that a motion for severance must be determined on the state of facts as set out in the motion or as otherwise shown at the time the motion is passed on." *State v. Wittmers*, 167 La. 379, 119 So. 263. Similarly, we have stated: ". . . it does not suffice in such a motion to allege in general terms that the defenses are antagonistic. The facts should be stated so as to enable the judge to ascertain whether the antagonism is such as to necessitate a separate trial. . . ." *State v. Birbiglia et al.*, 149 La. 4, 88 So. 533 (on the original hearing). See also *State v. Simon et al.*, 115 La. 732, 39 So. 971.

As in the Birbiglia case, only the confessions of these defendants were relied on in support of the severance motions. However, they did not indicate that the defenses were or would be antagonistic. Rather, each statement placed all of the accused in the com-

pany of one another continuously for some hours prior to, at the time of, and for a short period of time after the occurrence of the beating of Jang Gow which resulted in his death; and each set forth that they had agreed previously to rob jointly the decedent.

[6] As might be expected there were several minor and insignificant discrepancies in the separately given statements. But only one major discrepancy was contained therein, it concerning which of the three accused struck the fatal blows. Progue said that Williams did; Washington and Williams, on the other hand, stated that Progue alone was responsible. Nevertheless, this attempt to shift blame could not and did not (of itself) suggest antagonistic defenses, because under the murder-felony doctrine it is immaterial which of the accused actually administered the beating. Since the three were together in the perpetration of the robbery each was chargeable as a principal, regardless of whether he dealt the specific blows which caused the death. LRS 14:24.

The instant case is somewhat analogous to *State v. Birbiglia*, supra, which incidentally is cited and relied on here by defense counsel. Therein, each of the two defendants had confessed his engaging in the commission of the crime (a joint plan to rob which resulted in the killing of the victim) and he implicated the other. However, during the course of the trial, after motions for a severance had been overruled, each denied his taking part and testified that he had no knowledge of any intention of his codefendant to commit the offense. On the appeal this court noted that

the defenses had eventually proved to be antagonistic; but we observed that ". . . it does not appear that the judge had any reason to believe, when he was called upon to pass judgment upon the motion for a severance, that such a case would develop. Under these circumstances, the judge did not commit an error in overruling the motion for a severance."

The Birbiglia case seems to be even stronger than the present one, for the transcript herein does not disclose that the defenses eventually proved to be antagonistic.

Certain language in *State v. Cook et al.*, supra, is strongly relied on by counsel for these defendants. Therein (as in the instant case) the accused (two) had given confessions showing their joint participation in a robbery plan which resulted in the killing of the victim, but each blamed the other for the actual shooting. In the course of our opinion the following observation, quoted and emphasized by counsel for these defendants in their brief, was made concerning bill Number 2 that was reserved to the overruling of motions for a severance: "It is true that where defenses are antagonistic and where the confessions of each of the defendants incriminate the other and it is intended to use such confessions in evidence, a severance should be granted, . . ." However, closely following that observation is this language (not quoted by present counsel): "The per curiam of the court states in part that '. . . the proof submitted to the jury during the course of the trial certainly did not show that the defenses were antagonistic. In fact, the evi-

dence showed that both defendants were both present, aiding and mutually abetting in the commission of the crime. This makes them both guilty as principals.

. . .

"There is no merit in Bill No. 2."

[7] Several other decisions of this court are cited and relied on by defense counsel. But they merely recognize the well established principle that in a joint prosecution where the defenses are *shown* to be antagonistic, and a confession of a defendant implicating his codefendant will be introduced, a severance should be granted.

Since (as pointed out above) there was no showing on the hearing of the severance motions that the defenses of these appellants would be antagonistic (in fact, it does not appear that they later proved to be) we must conclude that the ruling complained of was not erroneous. In this connection it is appropriate to comment that the transcript before us supports the observation of the judge that during the trial the rights of the defendants were meticulously safeguarded in that as each confession was offered the district attorney specifically said that the introduction was to apply to and affect only the person giving the statement.

Further, we note that the judge's charge to the jury contained this language: "You are instructed that the confessions in this case have been introduced and received in evidence for the restricted purpose

of proving the guilt of the one making the statement, admission, or confession. You must *not* consider the confession or statement of one defendant in determining the guilt or innocence of another defendant."

Moreover, there does not appear to have been any antagonism among the defendants during the entire proceedings. In fact, it was agreed and stipulated that the pleas of any one of the accused would apply to all; no bill was reserved to any ruling relative to a conflict respecting the defendants' interests, notwithstanding that each accused had his own counsel; the several bills presented for our consideration were perfected as to all of the accused persons; and all defendants joined in one brief to this court.

Therefore, this bill is without merit.

[8] The defendants, in a motion to quash, alleged that the indictment was invalid because the grand jury which returned it was not properly charged as required by law regarding certain acts of the Legislature. To the overruling of the motion bill Number 3 was reserved.

In his per curiam to this bill the judge says: "The main complaint urged during oral argument on the Motion to Quash was the asserted failure by the Judge (who empaneled the Grand Jury) to charge said Grand Jury on various specific crimes, such as: laws regulating sale of intoxicating liquors, public bribery, bribery of voters, corrupt influencing, public intimidation, bribery of political candidates, and fail-

ure of fiduciaries to file accounts." And previously, during the argument on such motion, he had commented: "The charge to the grand jury that is now in the record does indicate that the grand jury was adequately charged on the basic duties of the grand jury."

In our opinion the judge properly ruled that the failure to include charges respecting the mentioned particular laws did not affect the instant indictment. There is no relationship whatsoever between the referred to specific crimes and the offense of murder which is involved here. Nor can we conceive of any way in which these defendants were prejudiced by the asserted defect in the court's charge to the grand jury, and they have pointed to none.

In support of their argument that the judge's failure to so charge strikes at the validity of the grand jury, defense counsel cite *State v. Lively*, 119 La. 363, 44 So. 128 and *State v. Kifer*, 186 La. 674, 173 So. 169, 110 A.L.R. 1017. These cases dealt solely with grand juries that allegedly were not *drawn* according to law. Thus, therein the court commented that the Legislature had, through the enactment of law, sought to place the grand jury as far as possible beyond interested control; and that, for this reason, the decisions have uniformly held that the requirements of a statute *prescribing the manner of drawing* the grand jury must be observed under penalty of the nullity of the indictment. Neither case presented an issue respecting the effect of an incomplete grand jury charge; hence, each is inapplicable here.

On the state's acceptance of the twelfth juror (previously, according to the trial judge's per curiam, the other eleven had been accepted by both sides and sworn) defense counsel interrogated him and then requested the court's permission to ask all twelve jurors "one or two" more questions. The judge refused the request. Thereupon, counsel accepted such twelfth juror, and to the mentioned refusal they reserved bill Number 3A.

[9] This bill of exceptions recites: ". . . the requested question was limited to the sole question as to whether or not all jurors would carefully consider all of the law which would be charged by the Court and apply all charges pertaining to the Court's instructions in their entirety whether or not this particular law had been previously explained to all jurors. . . ."

And the judge's per curiam states: "Defense counsel stated that the subject of the question he desired to ask was whether each juror would accept all, each and every part of the judge's charge to be given at the conclusion of the trial. This question had been substantially covered (not in this particular language) in questions by both the State and the defense to each juror in the box. . . ."

In support of this bill defense counsel particularly rely on LRS 15:359, reading: "Although a juror may have been accepted by both the prosecution and the defense, he may, none the less, up to the beginning of the taking of evidence, be challenged for cause by

either side, or be excused either for cause or by consent of both sides." But in neither the bill nor in the argument before this court have counsel suggested that there appeared to be cause for challenging one or more of the jurors or that any was apparently incompetent. Furthermore, as pointed out by the judge, the question which counsel proposed to ask had been previously propounded to (in substantially the same form) and answered by each of the accepted jurors. The court's ruling, hence, was in no manner prejudicial.

State v. Hills, 241 La. 345, 129 So.2d 12, cited and relied on by counsel for the defendants, is inapposite. That case dealt with the questioning of prospective jurors, whereas here counsel were attempting to further question all of the accepted and sworn jurors without even a suggestion of incompetence or of disqualification on the part of any of them.

[10] Bills Numbers 5 and 6 relate to the court's refusal on two occasions to permit defense counsel to interrupt the district attorney's questioning of a state witness (Sergeant R. L. Roberson) so that they might cross-examine him regarding testimony previously given. The rulings were made while the jury was retired, the witness having been testifying for the purpose of laying the foundation for the introduction of the confessions of the three defendants. In urging that the rulings were in error and prejudicial, counsel argue here: "This Honorable Court has held, on occasions too innumerable to render necessary ci-

tations of authority, that cross-examination is the means and implementation of affording a party (in this case, the accused) the inalienable right to *illicit* testimony which is unstained and unblemished by bias or prejudice, and that the Court and/or Jury may have an opportunity to hear such evidence in its true light. Likewise, this Honorable Court has, on innumerable occasions, stated that limitations placed upon cross-examination should be guarded jealously."

Counsels' appreciation of the jurisprudence, to which they make reference, appears to be correct. However, the doctrine involved therein is wholly inappropriate here in view of the circumstances surrounding the court's rulings. These, as noted in the judge's per curiam, were as follows: ". . . . when the objection was made, as shown in Bills Numbers 5 and 6, that the defense counsel wished to cross-examine this witness immediately after he testified about the Police statements of each separate defendant, this procedure became impractical. Not only was it a procedure constantly interrupting the State's examination of its own witness but it served no useful purpose and tended to confuse matters before the Court.

"This witness had much more testimony which the State was seeking to adduce in addition to the testimony about Police statements. . . .

"Therefore, it became apparent that the better procedure was to allow the State to finish its direct examination of this witness before being cross-examined on many matters by the defense. The de-

fendants were not in any manner cut off from full examination of this or any other witness. This occurred while the jury was retired and on his initial appearance.

"Sgt. Roberson was cross-examined fully and at length three times while the State was laying the foundation out of the presence of the jury, again on rebuttal out of the presence of the jury, once on testimony before the jury, and again on rebuttal before the jury.

"Since the defendants had full cross-examination of this and all other witnesses and the matter complained of in these bills pertain only to the cross-examination out of the presence of the jury, we see no error and no merit to these bills."

Under the stated circumstances there appears no error in the court's rulings.

Bill Number 7 was taken to the manner in which the court charged the jury regarding specific criminal intent.

As background, and for a better understanding of this exception, it is noticed that the defendants were prosecuted under the short form indictment; and in their motions for a bill of particulars they asked to be informed under which sub-section to LRS 14:30 (the murder statute) the state was proceeding. The district attorney answered that it was proceeding under *both* subsection 1 (this requires a specific intent to kill or to inflict great bodily harm) *and*

sub-section 2 (the felony-murder doctrine in which a specific intent to kill is not a requisite).

In his charge to the jury the judge stated that under the first sub-section specific criminal intent to kill or inflict great bodily harm is a necessary element; and, further, that under the second sub-section proof of a specific criminal intent to commit a felony (one of those named therein), during the commission of which the killing occurred, is essential. However, he refused to charge, as requested by defense counsel, that the jury could declare these defendants to be guilty of murder only in the event it found a specific intent on the part of them to kill or inflict great bodily harm. The basis for the requested charge was the contention that since the state had answered that it intended to proceed under *both* sub-sections (1 and 2) of the murder statute it must prove all of the elements listed in *both* sub-sections.

[11] Defense counsel seem to take the position here that the prosecution, being based on both sub-sections, was for two separate offenses. But this position is patently erroneous. Defendants were charged and prosecuted for but one crime: murder. And as stated in *State v. Rowan et al.*, 233 La. 284, 96 So.2d 569: "Article 30 of the Louisiana Criminal Code describes two sets of circumstances under which the crime of murder can be committed, but it is obvious that this crime can be committed under any one of the two sets of circumstances, and also under a combination of the circumstances, set out in Subsections (1)

and (2). . . . In short, murder can be committed under Subsection (1) or under Subsection (2) of the article or under both subsections at the same time, . . ."

As it did in the Rowan case (and as it was authorized to do) the state proceeded in the instant cause on the theory that the circumstances were such that the killing constituted murder under one or both subsections and, hence, that a finding of the elements necessary for either was sufficient to sustain a verdict of guilty as charged. Consequently, the judge properly instructed the jury as to the specific intent required to convict under each sub-section, and he did not err in refusing to charge as requested by defense counsel.

[12] Reservation of bill Number 7A occurred while the defendant Progue was being cross-examined, out of the presence of the jury, with reference to the manner in which his first confession had been obtained. The district attorney was questioning Progue, as to his treatment prior to giving the confession, when defense counsel interrupted and requested that the witness' reply to a previous question be read by the reporter for the purpose of clarifying the testimony then being elicited. The request was denied.

In his per curiam to this bill the judge properly observed that counsel for an accused does not have the absolute right to constantly interrupt cross-examination by the district attorney in order to clarify a witness' remarks; if there is any doubt or ambiguity

as to an answer it can be eliminated on redirect examination. Also, he noted that no attempt was made herein by defense counsel to question the witness later on this phase of his testimony. Moreover, the transcript discloses, as pointed out by the judge, that additional questioning by the district attorney himself (immediately following reservation of the exception) completely dispelled any doubt as to the meaning of the answer which counsel wished to clarify. Accordingly, there was no prejudicial error in the ruling complained of.

Lieutenant Harvey Pittman, a witness for the state, was called to testify with respect to the confessions given by the three defendants in the coroner's office. He said that each had made a statement separately and out of the presence of the other two. And during cross-examination he indicated that several times, while the respective statements were being made, the recording machine was momentarily cut off. On re-direct examination bill Number 8 was reserved, as recited therein, under the following circumstances;

"BY MR. RICHARDSON:

"Q. All right. Lieutenant Pittman, at the time that the machine was cut off to whom was A. G. Progue talking and with whom was he talking?

"MR. LEE. I object, Your Honor. There was—he did not say anything about whether it was A. G. Progue or which defendant was talking.

"THE COURT: Overruled.

"MR. LEE: I would like to reserve a bill of exception to the Court's ruling, on it.

"THE COURT: All right."

Immediately after the bill was reserved the district attorney (Mr. Richardson) asked:

"Q. Now, will you answer the question, Lieutenant Pittman? Do you know what the question was? And the witness answered:

"A. Yes, sir. I don't recall who the conversation was between or what it was about."

In view of this answer by the witness clearly the ruling complained of was to no extent prejudicial to any of the defendants.

To quote from remarks made by the judge during the trial of the case, bill Number 10 resulted in the following manner: ". . . A minute ago the State offered into evidence the gun while the laboratory technician was on the witness stand, and the question was asked the defense counsel, 'Is there any objection?' Not hearing any objection at that time the ruling was made that the gun would be admitted into evidence. At recess the court was informed by counsel for the defendants that they did want to object to the admissibility of the gun and reserve a bill to the Court's ruling admitting the gun. I was informed that the nature of the objection was that the gun had not been adequately identified by previous witnesses.

"The Court disagrees with the objection, but I think in fairness to the defendants and in order that

the defense lawyers may preserve their record and have the matter reviewed on appeal, that the objection should be noted. It should be noted that the defense objects to the admissibility of the gun, that has been previously introduced into evidence as State Exhibit 20. The ground for the objection as represented by counsel for the defense was that the gun has not been adequately identified and tied in by evidence either to this crime or to any of the three defendants."

[13, 14] Assuming arguendo that the gun was not adequately identified, it would seem that the complaint came too late to be of any avail to the defendants, the weapon previously having been introduced without objection and presented to the jury. To rule it inadmissible when defendants belatedly complained could not possibly eliminate the prejudice that had already resulted from the jury's viewing such evidence. But be that as it may we have examined the testimony adduced as a prerequisite for the gun's introduction, and we find that it supports the following conclusion announced by the judge: "The Court feels that the objection goes to the weight of the evidence and not to the admissibility; that there has been testimony adequately identifying the gun and connecting it with these defendants and this crime to make the gun admissible."

[15] Bill Number 13 was taken to the court's admitting into evidence confessions of the three defendants, as well as their oral statements made during re-enactments of the crime at the scene thereof,

all having been objected to by defense counsel on the ground that the state failed to prove that they were freely and voluntarily given.

The evidence made a part of the bill reflects that shortly after the middle of March, 1961 the defendants were arrested by Shreveport police officers and booked for suspicion of the murder of Jang Gow. Between March 30 and April 4, 1961 they, while in the city jail, gave separate written confessions to such officers. Thereafter, they were transferred to the Caddo Parish jail and, as a result, had no further contact with the city police.

On April 4, 1961 the defendants appeared separately before a deputy coroner of Caddo Parish. During the appearances the respective police statements were read to them and each admitted having signed the one given by him. Each was then questioned in further detail as to his part in the crime, and the questions and answers were received on a recording machine. Some three days thereafter, and following the transcribing of such questions and answers, the accused were separately returned to the coroner's office where each signed his second written confession.

In the meantime they were taken separately to the scene of the offense. There each re-enacted the crime's commission and gave an oral statement regarding it to the accompanying officers.

All of the authorities who had anything to do with the defendants in connection with the obtaining of their several admissions, statements and confes-

sions were called by the state. They testified that such were given without any unreasonable and undue pressure and in the absence of any promises, inducements, threats, coercion or mistreatment of any kind. With particularity the various officials described the circumstances under which, as well as the times when, the accused confessed. We deem it unnecessary to detail the lengthy testimony so elicited, it having been provided not only by the investigating officers but also by deputy sheriffs (who transported the prisoners from one place to another for questioning), by Shreveport's Commissioner of Public Safety and Chief of Police, and by Caddo Parish's district attorney, deputy coroner and the coroner's typist. Suffice it to say that such evidence more than adequately met the state's burden of showing the free and voluntary nature of the admissions, statements and confessions sought to be introduced.

It is true that all three defendants took the stand and stated that the police confessions were not free and voluntary. However, their testimony for the most part was vague and uncertain as to just what caused the involuntariness, they talking in terms of being "under pressure," that the investigating officers were "speaking in profane language," and that they were told that if they "talked" it "might go light" on them.

Williams did testify that he was struck by one the investigating officers, but his charge is hardly worthy of belief in view of the fact that it was not made until near the end of his recross-examination, he not having mentioned it previously on either direct

or redirect examination. Furthermore, he admitted that his police confession did not come at the end of a lengthy or arduous questioning. Rather, according to him, he called the Shreveport Chief of Police about nine o'clock in the morning of March 31, 1961 and said he wanted to make a statement; but that official told him to wait and make it to the officers who were handling the case. As a result the confession was not given until some one and one-half or two hours after his calling the police chief. We also note that while such statement was made on March 31 it was not prepared and presented to Williams for his signature until April 2, during which time there was no questioning of or pressure on him.

Also, Progue asserted thtat he was constantly subjected to harassing examination by the investigating officers for several days prior to making his police statement. He further asserted that he agreed to sign the purported confession because the officers had threatened to put his common law wife in jail if he did not. But not only is his testimony refuted by that of the investigating officers, it likewise conflicts with that of the deputy coroner, his typist and the district attorney who heard the answers given pursuant to questioning in the coroner's office. Moreover, his assertions appear highly questionable in view of his own testimony concerning a visit to him, during the day before the making of his police statement, by Shreveport's Police Commissioner Earl Downs who knew him prior to the arrest. As related by Progue, Commissioner Downs came to his cell and, among

other things, ". . . He told me, said, 'Well, Progue, if you haven't done it, don't say you done it, because they would have to prove it.'"

It is thus to be seen that a determination of the issue of the admissibility of the admissions, statements and confessions required a consideration of and a passing upon the credibility of the witnesses. The district judge resolved that issue in favor of the state and we, after our thorough study of the evidence, cannot say that he erred.

The facts and circumstances shown by the transcript before us distinguish the instant case from those decisions of this court cited by the defendants. In *State v. Roberson et al.*, 157 La. 974, 103 So. 283 the confession was made after an intensive questioning of the accused for approximately four hours, prior to which time he had been held incommunicado for over a month. In *State v. Ellis*, 207 La. 812, 22 So.2d 181 the first of the written confessions, which was in question and answer form, showed that an inducement of lighter punishment had been offered; further, therein, the state did not call all of the witnesses whose signatures were affixed to the confession. In *State v. Crittenden*, 214 La. 81, 36 So.2d 645, the facts as borne out "by the testimony of the officers" disclosed that the defendant had been promised lighter punishment if he confessed; also, he had been struck in the face, taken to the open grave of the victim and shoved into it, and forced to attend the decedent's funeral. In *State v. Wilson*, 214 La. 317,

37 So. 2d 804 the accused had been struck by the original arresting officers for failing or refusing to answer their questions, and the confession was finally obtained after a prolonged period of questioning (from 11:30 o'clock at night to 5:00 o'clock the next morning).

The federal cases cited are not applicable. In them the court ruled inadmissible the several confessions because of undue delay by the arresting authorities in bringing the accused persons before committing magistrates in compliance with specific federal legislation. Under these circumstances, said the court, the confessions were illegally obtained and hence not admissible. See *McNabb v. United States of America*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, which is explained in *Upshaw v. United States of America*, 335 U.S. 410, 69 S.Ct. 170, 93 L.Ed. 100. As pointed out in the opinion in *United States of America v. Carignan*, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48, this is a recently "judicially created federal rule of evidence". Incidentally, that rule does not exist in this state, the sole question here being whether the confession was freely and voluntarily given.

Inasmuch as defense counsel, throughout their argument here on this bill, have constantly asserted that the accused were held in "solitary confinement" (and have made reference to the effect of such confinement on them) we offer the observation that such assertion is without any substantial basis. The transcript contains no testimony whatever, even by the

defendants, that any one of them was ever placed in "solitary confinement" as that term is commonly used. True, they were kept in separate cells in order to avoid their collaboration. But these were in a cell block and were enclosed only by the customary bars. There was nothing to prevent the defendants from talking to persons passing in the hallway or to those in adjoining and nearby cells.

It follows that the ruling complained of in bill Number 13 cannot be disturbed.

For the reasons assigned the convictions and sentences are affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 25534

D. C. Docket No. CA 12,540-S

WINGATE WHITE, WARDEN,
LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

Appellant,

V.

ALBERT GEORGE PROGUE, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before Tuttle and Simpson, Circuit Judges, and Brewster, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Wingate White, Warden, Louisiana State Penitentiary, Angola, Louisiana, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 16, 1968

Issued as Mandate: June 7, 1968

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION

No. 12,540

ALBERT G. PROGUE, ET AL

V.

J. D. MIDDLEBROOK, ACTING WARDEN
OF THE LOUISIANA STATE PENITENTIARY

DECREE

THIS CAUSE came before the Court, the Honorable Ben C. Dawkins, Jr., District Judge, presiding, on plaintiffs' petition for writs of habeas corpus, and the issues having been heard and the Court having duly rendered an opinion, now for written reasons assigned and filed herein.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' application for writs of habeas corpus are granted, and that the defendant has six months within which to re-try them, after the finality of this decree.

In the event of an appeal by defendant, said six months period is not to begin to run until final disposition thereof.

Shreveport, Louisiana, August 15, 1967.

Filed
August 15, 1967

/s/ Ben C. Dawkins, Jr.
District Judge

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

CIVIL ACTION

No. 12,540

ALBERT GEORGE PROGUE,
JOHNNY JAMES WILLIAMS, AND
ROOSEVELT WASHINGTON

V.

J. D. MIDDLEBROOK, ACTING WARDEN
OF THE LOUISIANA STATE PENITENTIARY

RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

NOW INTO COURT, through Jack P. F. Gremillion, Attorney General for the State of Louisiana, and other undersigned counsel, comes J. D. Middlebrook, Acting Warden of the Louisiana State Penitentiary, and files his response to the application for a Writ of Habeas Corpus and respectfully represents that:

1.

Respondent admits the allegations contained in Article 1 of relators' petition.

2.

Respondent denies the allegations contained in Article 2 of relators' petition.

3.

Respondent admits that he is holding the relators under a judgment of the First Judicial Court of the Parish of Caddo, State of Louisiana, rendered on the 22nd day of November, 1961, but respondent denies all other allegations of fact contained in Article 3 of relators petition.

4.

Respondent admits the allegations contained in Article 4 of relators' petition.

5.

Respondent admits the allegations contained in Article 5 of relators' petition.

6.

Respondent denies the allegations contained in Article 6 of relators' petition.

7.

Respondent denies the allegations contained in Article 7 of relators' petition.

8.

Respondent denies the allegations contained in Article 8 of relators' petition.

9.

Respondent denies the allegations contained in Article 9 of relators' petition.

10.

Respondent denies the allegations contained in Article 10 of relators' petition.

11.

Respondent admits that petitioners appealed to the Supreme Court of Louisiana, which affirmed the judgment and sentence; and respondent is informed that an application for writs to the United States Supreme Court was filed.

Further answering relators' petition, respondent shows:

12.

He is holding the relators under the following instruments at the Louisiana State Penitentiary, copies of which are attached hereto and made a part hereof, to-wit:

(a) A Grand Jury Indictment entitled "*State of Louisiana v. Albert George Progue, Roosevelt Washington and Johnny James Williams*" charging the relators herein with the murder of Jang Gow on the 14th day of December, 1958, and signed by Truly Whittington, Foreman of the Grand Jury. Said Indictment bearing Number 57,148 and bearing a notation upon the back "We, the Jury find the defendants guilty as charged. June 17, 1961, s/ J. L. Lowe, Foreman."

(b) An extract from the minutes of the court dated November 22, 1961, showing the sen-

tence of the court of Albert George Progue, Roosevelt Washington, and Johnny James Williams to be that they be put to death by electrocution.

(c) A statement of facts dated October 5, 1962, signed by John A. Richardson, District Attorney, and Honorable John A. Dixon, Jr., Judge for the First District Court of the State of Louisiana.

13.

Respondent further shows that all issues which are set forth in the application for a Writ of Habeas Corpus have been raised in the state trial court and that a transcript of the trial was prepared and submitted to the Louisiana State Supreme Court, a copy of which is attached and made a part hereof.

14.

Respondent further shows that a factual determination of all the issues in the present application for a Writ of Habeas Corpus (and other issues) was made after a hearing on the merits thereof by a State court of competent jurisdiction (the First Judicial District Court in and for Caddo Parish, Louisiana) in a proceeding to which the applicants and the State of Louisiana (through the District Attorney) were parties, as shown by transcript thereof which is attached hereto and made a part hereof and incorporated herein, particularly

(a) the oral opinion of the trial judge (State tr. 674-77) which ruled that the confessions

were made freely and voluntarily, based on the "totality" of the facts;

(b) the trial judge's Per Curiam to Bill of Exception No. 13 which is a written opinion to the same effect (State Tr. 249-261);

(c) Minutes of Court showing overruling of Motions for Severance (State Tr. 8-9);

(d) the trial judge's Per Curiam to Bill of Exception No. 2 which is a written opinion relative to Severance (State Tr. 144-46); and

(e) the opinion of the Louisiana Supreme Court on appeal of the whole case, reported in 243 La. 337, 144 So.2nd. 352.

15.

Respondent further shows:

(a) the merits of all factual disputes were resolved in State Court hearing, by the trial judge, the jury and State Supreme Court;

(b) the fact finding procedure employed by the State Court was fully adequate to afford, and did afford, a full and fair hearing, particularly on the free and voluntary nature of the confessions and the "totality" of the facts because

(1) the State, under Louisiana law, was compelled to first prove all facts surrounding the giving of the confessions before the trial judge alone, out of the presence of the jury, during which hearing the defendants were allowed to take

the witness stand for that limited purpose of traversing the State's foundation; the defendants did each do so and likewise produced additional witnesses of their own; and then the trial judge ruled that the State had proved that the confessions were admissible evidence;

(2) the State was then compelled to again prove, before the jury, all facts surrounding the giving of the confessions so as to show the "totality" of the facts and to convince the jury beyond a reasonable doubt that the confessions were in fact given freely and voluntarily;

(3) the defendants, in their case in chief before the jury, again testified in their behalf to traverse the State's foundation and again produced the same and other additional witnesses; all as shown by State Tr. 270-1245. (These last four volumes of the transcript contain all of the testimony and evidence relating to the facts surrounding the giving of confessions, including testimony adduced out of the presence of the jury and testimony before the jury.)

(c) all of the material facts were more than adequately developed at the State court hearing, some of them several times;

(d) the State court did have jurisdiction both of the subject matter (state crime of murder) and over the persons of the applicants herein, in the State court proceeding;

(e) although there was no proof of indigency by the applicants, the State court appointed separate counsel for each applicant, which counsel were competent and had at least five years' practice in Louisiana (one had practiced for more than 24 years with active criminal experience for many years), and said counsel were appointed on May 17, 1961, the very next day after the indictment was returned on May 16, 1961 (and long before formal arraignment);

(f) each of the applicants received a full, fair and adequate hearing in the State court proceeding, which consisted of (among other things) full arguments on all pre-trial motions, a complete 12-man jury trial which required a unanimous verdict under State law, many months to perfect all desired Bills of Exception, full arguments on the Bills of Exception and post-conviction Motions (Motion for New Trial and in Arrest of Judgment) and unlimited time for briefing and argument in the Louisiana Supreme Court on appeal;

(g) under the present jurisprudence of the United States Supreme Court as of the date of the filing of this Response, your Respondent shows that no one of the applicants was in any wise denied due process of law in the State court proceedings; and

(h) an examination of the transcript attached hereto and of the opinion of the Louisiana Supreme Court, will show that the "record in the State court proceeding, considered as

a whole" leads to the inevitable conclusion by this Honorable Court that the factual determination is more than "fairly" supported (indeed, overwhelmingly supported) by the record.

WHEREFORE, Respondent prays that the application for a Writ of Habeas Corpus be denied.

BY ATTORNEYS

JACK P. F. GREMILLION,
Attorney General of Louisiana.

TEDDY W. AIRHART, JR.,
Assistant Attorney General.

JOHN A. RICHARDSON,
District Attorney,
First Judicial District,
Caddo Parish, Louisiana.

CERTIFICATE

I certify that a copy of the foregoing response to the application for a Writ of Habeas Corpus has been served upon the Relators through their counsel of Record, Mr. Dan A. Spencer, 1639 Kings Highway, Shreveport, Louisiana, by United States Mail, postage prepaid, to his office.

Shreveport, Louisiana, ...

JOHN A. RICHARDSON

APPENDIX C

Excerpt From State Trial Court Transcript

MR. RICHARDSON: May it please the Court, he State at this time renews its intention of wishing nd planning to rely as a part of the State's case in hief on the coroner's statements made by each of hese three men, the police statements made by each f these three men, which have been reduced to writng, and the oral statements made by each of these hree men at the time they re-enacted the crime.

(Off the record discussion.)

MR. LEE: If Your Honor please, we take the osition that the statements are not free and volunary, that they are not admissible for a number of easons.

(Off the record discussion.)

THE COURT: Well, the Court is familiar with he authorities mentioned by counsel, and with the rguments mentioned by counsel. The principal basis or the objection to the confession, statements and admissions are grounded on an alleged illegal detention y the city police of these defendants.

The Louisiana law, which is not uncommon, alows an arrest when a felony has been committed nd an officer believes he has reasonable cause to elieve the person he has arrested has committed the elony. There has been no illegal arrest in this case. There has been no illegal detention in this case.

The stipulation about the testimony of Chief Teas-

ley at the request of defense counsel, after he left the stand last night, contained the information that these three men were booked in the jail on certain dates. One of those dates was different from the one that some of the officers had testified to previously. Some of them had said some of them were arrested on the 17th, and the information in the stipulation was that they were booked on the 16th. I think there is no question at all about the admissibility or about the voluntary nature of these statements. I don't believe they were extorted by force or violence or threats or intimidation or any promises or inducements.

The promises and inducements that have been mentioned were to the effect that, "If you talk the district attorney will get you a light sentence," which, at least, in this jurisdiction, is certainly a fantastic statement. And I don't think anybody would believe anyone who would make such a proposition to them.

Williams' statement and Washington's statements are, by their own testimony, admissible, free and voluntary, and obtained without duress and without intimidation, and without promise of reward. There has been much made of the visit of two women to the cells of Williams, but there has been nothing but an inference that that visit was improper. And it has been pointed out by the district attorney that could not be considered in the class of coercion or a threat or intimidation. And, if we are to believe that these men are willing to confess to a crime like this in the hope of having a visit, a visit in jail, from a woman, then, the credibility of these defendants is

not bolstered by such a contention. As a matter of fact, we think that there has been no proof that there was anything improper about the visit of these two women to the jail to see one of the prisoners. Quite the contrary, it indicates a consideration for the welfare of the prisoners that you might not expect to find.

As to Progue's contention that he was coerced into making a statement because his wife, his common-law wife, the woman with whom he had been living, outside of wedlock, was under some sort of threat, there are two observations about that contention.

The first one is that the woman was here, produced by the district attorney, testified and was not examined on the point. She did not—there was an effort to examine her about some sort of abuse by the police, and her answer to the question was—whatever the question was, however the question was precisely worded I forget at this time, but her answer was, "No, sir, not exactly." And the question had to do with whether or not there had been any abuse by the police, or whether she was under any duress by the police. That was the only question asked that woman on the stand by the defense counsel that had anything to do with this contention by Progue that she was or that he was threatened with her incarceration if he didn't tell the truth. Such a threat on its face is unrealistic. It is almost unbelievable that such a threat would be made or that such a threat if made would be believed.

Progue himself has testified to nothing that

transpired intimidating him, nothing that happened to him, nothing that he said happened to him frightened him into making a statement; that he finally made a statement, Progue says, only because he feared incarceration of his wife, and that incarceration was as a material witness. It is again outside of the province of the city police to take such action. They each denied, each person who might have had something to do with such a threat, denied having made such a threat to Progue.

It resolves to a question of credibility, and if anything Progue proved on his testimony in this Court, it was that Progue cannot be believed because Progue testified that in this sworn statement that he made before the coroner, he swore to something that was not true. He contradicted that sworn statement in his sworn testimony in this court.

So, if we have to take Progue's word over the word of Sergeant Roberson or Lieutenant Pynes, we will take the word of Sergeant Roberson and Lieutenant Pynes.

If that were the only thing about Progue's story that made it patently unbelievable, we believe the district attorney, the State of Louisiana, have borne the burden of proving that these statements and admissions, the confessions, the re-enactments of the crime, come within the rule of law in the State of Louisiana, and are admissible.

MR. LEE: If counsel please, since we have a record, I believe you have slightly misunderstood one

thing, insofar as the stipulation of counsel. We did stipulate that we would take Harvey Teasley's word, Chief of Police, insofar as the arresting parties are concerned. There was no stipulation pertaining to booking.

(Off the record discussion.)

THE COURT: All right. You made your point.

We will now recess until fifteen minutes after two.

(Whereupon, at 1:15 p. m. court was recessed until 2:15 p. m. of the same day.)

APPENDIX D

No. 57,148

CRIMINAL DIVISION
FIRST DISTRICT COURT
CADDO PARISH, LOUISIANA

STATE OF LOUISIANA

V.

ALBERT G. PROGUE, ET AL

Per Curiam to Bill of Exception Number 13

In order to understand the matters complained of in Bill Number 13, it is necessary that the Court outline some of the facts of this case.

The deceased was an elderly Chinese man named Jang Gow, (born in San Francisco) a widower who had operated the New York Cafe at 1038 Texas Avenue, Shreveport, Louisiana, with his son, Nuey Gow, since 1940. On December 14, 1958, during the commission of an aggravated burglary and a robbery by some colored men, Mr. Gow, who lived inside the cafe premises, was beaten about the face and head by one or more colored men who were committing the said burglary and robbery. The State contended that the three men were the three defendants on trial, and that the weapon used in the beating of Mr. Gow during the robbery and burglary was a pistol which belonged to A. G. Progue.

The premises at 1038 Texas Avenue consist of the cafe, behind which is a shed area having walls and a partial roof connecting the cafe to a small two-room

residence building at the rear. The cafe proper consists of a front room with tables and a counter for serving food to customers and a rather large kitchen area immediately behind.

In one rear corner of the large kitchen area is a small bathroom (together with a storage room). Opposite those two small rooms, and in the other rear corner, is a bedroom which Mr. Gow had used as his home since 1940. Because Jang Gow was old and did not wish to live with his son and his son's family a few blocks away, his son had two of the older grandsons sleep in the two-room residence building connected with the shed area at the rear of the cafe so that someone would be on the premises with Mr. Gow.

The evidence was uncontradicted that a sum of money between $50.00 and $60.00 was removed from the cash register during the robbery by the assailants. It was also undisputed that a part of the New York Cafe building was used as a residence for Mr. Gow and that he was present when the burglary and robbery occurred. He died two weeks later in the hospital and his death was directly caused by the injuries which he received during the course of the aggravated burglary and robbery.

It was also established that Mr. Gow had already retired for the night in the early evening of December 13th; and that it was his custom to arise between 2:00 and 4:00 A.M. to fix his breakfast and to begin preparing food for customers, many of whom arrived around 5:00 A.M. From the beating Mr. Gow lost

considerable blood but he managed to make his way through the shed area back to the two-room residence building adjoining the New York Cafe on the rear of the premises where the two grandsons were sleeping.

This was shortly before 5:00 A.M. on December 14, 1958. He was then still bleeding and blood was found at various places in his bedroom, on the wall of the storage room directly opposite his bedroom door, and in the kitchen near the cash register.

Lt. Pynes of the Shreveport Police Department came to the scene immediately after the grandsons saw Mr. Gow. Pynes made a careful examination of the premises, gathered certain evidence and had photographs taken at the scene.

This killing remained unsolved for almost two and one-half years. During the month of March, 1961, Sg. Roberson, a Shreveport Detective, followed certain leads and discussed them with his superior, Major Borland. During the latter half of March, 1961, Sgt. Roberson arrested Johnny James Williams at his place of employment on a Friday about 5:00 P.M. On the same day, he arrested A. G. Progue at his residence about 7:00 P.M. Also on the same day about 9:00 P.M. he arrested Roosevelt Washington.

On that day he did not question any of the three defendants about this matter. After talking briefly with Roosevelt Washington he allowed him to go home on Washington's promise to return the next morning, on a Saturday. Washington did return about 10:00 A.M. the next day and during that day Washington

made certain voluntary statements indirectly implicating Progue and Williams.

Shortly thereafter, Major Borland retired from the Police Force after 21 years service and Roberson was alone on the investigation. Roberson, however, did not ever question any of the men by himself.

A few days later, Lt. Pynes (who had answered the original call as a detective on December 14, 1958) was assigned to assist Sgt. Roberson after Major Borland's retirement. This was on March 30, 1961. That evening Roosevelt Washington made a recorded statement to Pynes and Roberson at the Caddo Sheriff's Office (Shreveport Police Department does not have a tape recorder or other recorder).

A few hours later, shortly after midnight (Pynes and Roberson being then on the night shift) Washington made another oral statement describing the clothes of the three men, which they wore on the night of the crime. Washington immediately thereafter also voluntarily went with those two officers to his home and recovered for them an Eisenhower Army jacket which he said was his and which he said he wore on the night of the crime.

Immediately thereafter Williams voluntarily went with those two officers to his brother's house (those officers had been unable to locate his brother's house) and recovered for them a check car coat which he said was his (and which fit the description of the coat Washington had said Williams wore on the night of the crime).

About 10:00 A.M. on March 31st, Williams sent word to Chief Teasley that he wished to make a statement. Teasley told him that the proper procedure would be for Williams to make his statement to the investigating officers and asked if it would be all right for him to send for Pynes and Roberson. Williams agreed to this so Pynes and Roberson came from their respective homes where they had been sleeping and again talked to Washington and Williams.

At that time, Washington and Williams were taken to the Sheriff's Office where each separately and voluntarily made a recorded statement in the presence of Pynes and Roberson. They likewise at that time each separately offered to make a reenactment of the crime at the scene of the crime.

Accordingly, Washington and Williams were brought separately to the New York Cafe and there in the presence of those two officers, the Chief of Police, the District Attorney, the Police Commissioner, the son and a grandson of the deceased, and representatives of the press and radio and television, including photographers, they each separately made oral statements and pointed out the part that each had played in the crime and the part that he saw each of the other two men play in the commission of the crime.

Shortly thereafter on the same day those two officers interviewed Progue and he told them that he owned a pistol which he had sold to one Herbert Young, and that Herbert Young had lost it in a dice game on the Cooper Road. The next day, on Saturday,

April 1st, Pynes and Roberson located Herbert Young and learned that he had pawned the pistol to one Melvin Dixon and that it had been taken from Dixon in a criminal case in Bossier Parish by Bossier Deputy Sheriff Vol Dooley. Herbert Young went with them to Dooley's home in Bossier Parish and there Dooley delivered the pistol to Pynes and Roberson.

Those officers then returned to the City Jail and showed the pistol to Washington and Williams separately. They each said that it looked like the one that Progue used on the night of the crime in beating Mr. Gow. On that same day, April 1st, those officers showed the pistol to Progue and he tried to differentiate it from the one he had sold to Herbert Young (See Page 157 of the Testimony). Progue also mentioned having sold another pistol to James Henderson. Pynes and Roberson went out and interviewed Henderson.

The next day, on Sunday, April 2nd, the oral statements of Washington and Williams were reduced to writing and typed by Lt. Pynes exactly as each man dictated his statement. At about 5:00 to 5:30 P.M. on April 2, 1961, Washington and Williams then signed their respective statements, designated as Police statements by the prosecution.

On Monday, April 3rd, Pynes and Roberson recovered from Progue's common-law wife a khaki jacket which she said belonged to Progue (and which was subsequently identified as being the one which Progue wore on the night of the crime). Somewhere around 7:30 P.M. on Monday, April 3rd, Progue offered to

make a statement to Pynes and Roberson, which Pynes typed as he dictated and which Prague signed.

At that time, on April 3rd, Prague volunteered to make a re-enactment of the crime at the scene. From the time that each man signed his Police statement he was never interrogated again by Pynes or Roberson (other than the fact that those two officers talked with Prague the next day at the scene of the crime when Prague made his re-enactment).

Accordingly, about 10:00 A.M. on Tuesday, April 4th, Prague went with Pynes and Roberson to the New York Cafe and there in their presence and in the presence of Nuey Gow and other members of the family of Jang Gow, Prague pointed out his part in the commission of the crime. No other officers were present at that re-enactment.

When Prague was returned to the City Jail after the reenactment, Washington and Williams were in the process of being transferred from the City Jail to the Parish Jail, so Pynes and Roberson had Prague transferred along with them. Those two officers did not take part in transporting the three men to the Parish Jail and never questioned any of the three men again.

Subsequently, in regular routine procedure, the Coroner's office sent word to the Sheriff's office to have each of the defendants brought from the Parish Jail on the seventh and eighth floors to the Coroner's office on the sixth floor of the Parish Court House for the Coroner's investigation. The Sheriff's office des-

ignated Lt. Pittman to bring down each man separately that afternoon.

At the Coroner's office, in the presence of Dr. DeLee, then Deputy Coroner (now Coroner), the District Attorney, and Lt. Pittman each of these men, after being first given the usual coroner's warning (which is typed at the top of each coroner's statement), said that he wished to make a statement and then was sworn to tell the truth.

In each of these Coroner's statements Dr. DeLee first read to each man his Police statement and asked him if he had signed the Police statement and if the matters contained in the Police statement were true. Each one answered affirmatively. Progue made two minor corrections in his Police statement which the Coroner noted.

Then as a part of his regular investigation the Coroner, together with occasional questions by the District Attorney, asked further questions which each of the men answered and everything was taken down verbatim on a tape recording machine operated by Dr. DeLee. This was on the afternoon of April 4, 1961, and the defendants were then each returned to the Parish Jail in custody of the Sheriff.

A few days later, on April 7, 1961, the Coroner's typist, Mrs. Frey, notified the Sheriff's office that the statements had been transcribed from the tape recorder and requested that each of the men be brought back separately. The Sheriff's office assigned Lt. Ira Tilley to bring the men down separately.

This was done and in the presence of Mrs. Frey and Lt. Tilley, each man's statement was read back to him by Mrs. Frey, each was asked if it was correct and upon his saying that it was correct each man then signed several copies of his statement. These statements are designated as Coroner's statements by the prosecution.

Upon the trial of the case when the State arrived at the point that it was about to lay the foundation showing that the Police statements, statements made at the separate re-enactments, and the Coroner's statements were free and voluntary, the District Attorney requested that the jury be sequestered.

This was done and then for many hours the State produced each officer who had had any contact with any one of the defendants at any time he was questioned or interviewed about this case. This included not only investigating officers, but all officers at the separate re-enactments, the deputy sheriffs that transported the prisoners back and forth from jail to the coroner's office for the making of coroner's statements and later for the signing of the Coroner's statements.

In addition it was stipulated that the testimony of the District Attorney would be the same as Chief of Police Harvey Teasley at the re-enactments by Washington and Williams and that the testimony of the District Attorney would be the same as Dr. DeLee when he was present at the time that each defendant orally gave his Coroner's statement on the tape recorder.

Therefore, the State adequately met the burden

of producing all persons who had any contact with the accused at any time any one of them made any type of statement.

Thereafter, after each of the defendants, out of the presence of the jury, took the stand on his behalf and likewise produced outside witnesses, all in an effort to show that the statements were not free and voluntary. (After that, the State called most of its witnesses back to the stand in rebuttal of each and every alleged claim by the defendants of any abuse, threat, promise or inducement.)

When Roosevelt Washington was on the stand for this purpose, with the jury being out, he stated at least four times that the Coroner's statement was true and voluntary (see Testimony, Page 311). In view of that, the District Attorney announced that he had no questions to ask Washington as to the voluntary nature of the statements.

Williams in his testimony acknowledged that he never made any complaint to anyone about any mistreatment by any officer although there were occasions when he was taken back to his cell by Sgt. Roberson alone and by Lt. Pynes alone, and though on one occasion Police Commissioner Downs and Chief Teasley talked to him through the bars of his cell and no other police officer was around. Although at the time of the re-enactment he was in Jang Gow's bedroom with the District Attorney (see Testimony, Pages 268-271) he made no complaint of abuse.

Likewise on cross-examination Williams again

confirmed everything that he had said and pointed out at the re-enactment, as testified to by Chief Teasley (see Testimony, Pages 272-275). In his testimony he also confirmed everything he said in his Coroner's statement and that he made no complaint to Dr. DeLee, Lt. Pittman or the District Attorney about any mistreatment nor to Lt. Tilley three days later on April 7th when only Tilley and the typist were present. (See Testimony, Pages 275-277.)

Also, on cross-examination with the jury out, Williams acknowledged that his having received a woman visitor while he was in the City Jail was not any mistreatment or abuse. (See Testimony, Page 286.) Further, he admitted that when he gave his Coroner's statement he gave information and answered questions that were additional to what he had said in his Police statement (all without any prompting from anyone). (See Testimony, Pages 286-288.) (Progue also admitted giving information in his Coroner's statement that was additional to his Police statement. See Testimony, Pages 361-362).

Therefore, by their own testimony while the jury was sequestered, the Coroner's statements and Police statements of Washington and Williams were freely and voluntarily made, as well as their statements at the re-enactments. One item that impressed the Court that Williams was falsifying his claims of mistreatment, coercion and promises was his obviously false testimony that Mrs. Frey did *not* read back the Coroner's statement to him when he signed it, yet Lt. Tilley and Mrs. Frey had testified positively that she

had done so. (Both Progue and Washington acknowledged that Mrs. Frey read their statements in full to them.) It is inconceivable that she would read the statement back to two of the defendants and fail to do so to the other. (That was her sole duty and the only reason for the men being brought to the Coroner's office that day.)

When they were attempting to traverse the State's foundation showing the voluntary nature of the statements, each of the defendants, particularly Progue, made claims that were so fantastic that they were utterly unworthy of belief. Progue even told of alleged mistreatment by one of the detectives on a particular date when the evidence was overwhelming that Progue had not been questioned by *any* officer on that day.

Progue also claimed that he only signed the Police statement because he was fearful about his common-law wife possibly being charged as a material witness. Yet, the State produced his common-law wife as a State witness and she was not examined by any defense counsel on any such matters as that.

Progue obviously falsified his testimony when he said there were five persons present (including himself) at the time he gave his sworn Coroner's statement, vaguely mentioning an unknown mysterious man in a blue suit in addition to Dr. DeLee, Lt. Pittman and the District Attorney. The testimony of the last three named persons is directly contrary to Progue's vague assertion on this item.

In our opinion, Progue proved on his testimony in Court that he cannot be believed because Progue testified that in the sworn statement that he made before the Coroner he swore to something that was not true. He contradicted flatly that sworn statement in his sworn testimony in this court.

(It might be noted that the Court's opinion as to the credibility of the defendant Progue was fully borne out by the fact that when he testified in the presence of the jury, Progue acknowledged on cross-examination by the District Attorney that he was claiming for the first time at least eight to ten more items of mistreatment in the presence of the jury than he had claimed while the jury was out.)

We find that the evidence was conclusive that the statements made by each of these defendants not only at the Police Station but at the re-enactments of the crime and at the two visits to the Coroner's office (when there were no City Police Officers present on either visit) were freely and voluntarily made and therefore admissible.

They were not confessions in the strict sense because neither man ever stated that he did the beating of Mr. Gow. It would seem that if the Police officers were to force a statement out of one of these defendants by threats or promises or mistreatment, such a statement would be a full confession and would implicate that man as having done the beating.

Moreover, the State again laid the complete foundation as to the voluntary nature of all statements

in the presence of the jury and each defendant again presented his fantastic claims to the jury. This included on the part of Progue, many additional things that he claimed for the first time, and on the part of Washington, several items of alleged mistreatment although Washington out of the presence of the jury had acknowledged that his Coroner's statement was free and voluntary and that he had not signed it through any fear.

For the reasons given hereinabove and also as set forth in our original ruling, it is our opinion that all the statements referred to above were freely and voluntarily made and were admissible. Therefore, there is no merit in this Bill.

/s/JOHN A. DIXON, JR.
Judge